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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: EAC-01-181-53466 Office: Vermont Service Center Date: MAY 29 2003

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)

ON BEHALF OF PETITIONER:

[redacted]

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Myna L. Rosenberg
for Robert P. Wiemann, Director,
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Apepals Office on appeal. The appeal will be dismissed.

The petitioner, an import/export company, seeks authorization to employ the beneficiary temporarily in the United States as president of its new office. The director determined that the petitioner had not established that the foreign entity has sufficiently funded the United States entity, that the beneficiary has been employed abroad or would be employed in the United States in a primarily managerial or executive capacity, or that there is a qualifying relationship between the U.S. and foreign entities.

On appeal, counsel argues the applicant has submitted sufficient documentation to establish that the foreign entity can support the U.S. entity, that the beneficiary has been employed abroad in an executive position for more than one year, and that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Counsel further argues that a qualifying relationship does exist between the United States and foreign entities.

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.

Regulations at 8 C.F.R. § 214.2 (l)(3)(v) state 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.

The U.S. petitioner states that it was established in 2001. The petitioner does not state the proposed number of United States employees or its proposed gross annual income. It seeks to employ the beneficiary for a one-year period at an annual salary of $60,000.

The first issue to be addressed in this proceeding is whether the petitioner has submitted sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

> *Branch* means an operating division or office of the same organization housed in a different location.

Regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

> *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner [redacted] claims to be a subsidiary of the foreign entity, Shanghai Yuqiu Commercial Trade Company, Ltd. In denying the petition, the director stated, in pertinent part, that:

> The beneficiary is stated to own 60% of [redacted] Commercial Trade Development Co., Ltd. and its subsidiary organization in Canada. You have further indicated that the company owns 100% of the new office in the United States. As evidence of the ownership and control of the new office, you have provided a copy of one share certificate that was issued to [redacted] on August 10, 2001. The share certificate states that Mr. [redacted] owns 20 shares of the stock of the new office. In your statement you assert that the rest of the "non-issued" shares of stock are held by the foreign organization.
>
> Lastly, you were asked to provide documentary evidence of the purchase of the U.S. corporation's stock by the

foreign entity. To date, no credible evidence of this claimed transaction is present in the record.

In light of these facts, it is not clear that a qualifying relationship exists between the U.S. entity and the foreign entity.

On appeal, counsel states that "a stock certificate is only one evidence of ownership, which would not necessarily exclude the other evidence of the proprietary relationship between two entities". Counsel references the submission of minutes of a board of director's meeting of the "parent" company indicating the reason for establishing the U.S. company, the form and amount of the investment and parental control (stock) of the U.S. entity.

A review of the record reveals that the "minutes" of the board of directors meeting referred to by counsel indicates that the parent company, [redacted] Commercial Trade Development Co., Ltd., owns 100 percent of a Canadian subsidiary founded in 2000 and that the Canadian company, MIN GLOBAL TRADING (CANADA), INC., remitted $13,650 on two separate occasions purportedly as an initial investment in the United States facility, [redacted] USA Corporation. The record does not contain any evidence that the parent company established or purchased the Canadian facility. Further, a copy of the stock purchase agreement, according to counsel, the only stock issued, indicates that [redacted] was issued stock certificate #1 denoting his 20 shares of stock in the U.S. entity. However, the stock certificate submitted, in response to a service request, clearly shows that stock certificate number eleven (11), was issued in August 2001, some three months after the petition was filed. Further, other evidence of record indicates that the beneficiary owns 60 percent of the United States entity.

The record does not clearly establish ownership and control of the United States entity and the Foreign entity. Nor can it be ascertained from the record that only one stock certificate was issued by the U. S. entity as claimed by counsel, and that the foreign entity, [redacted] Commercial Trade Development Co., Ltd. does, in fact, own and control the United States entity, through a Canadian subsidiary. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on 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 (Comm. 1988). The record does not establish that a qualifying relationship exists between the United States and foreign entities. For this reason, the petition may not be approved.

The next issue to be addressed is whether the beneficiary has been or 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:

> "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:

> "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 beneficiary's duties with the foreign entity are described, in pertinent part, as follows:

> [The beneficiary] is president of [redacted] Commercial Trade development Co., Ltd. She owns 60% of the shares of both the foreign company and our company (the petitioner).[The beneficiary] is a successful businessperson, as demonstrated by the continuing growth of and vitality of her business operation in China, Canada and Hong Kong. Her skill of starting a new business and nurturing its growth over a short period of time is exactly what [redacted] USA, Corp. needs for the successful commencement of operations of this company.
>
> [The beneficiary] has many years of managerial experience. She is the founder of the parent company. As the president of the parent company in Shanghai, China, [the beneficiary] has directed the management of four departments and run three factories of the company. She was involved in the establishment of the Canada company in 2000. It established a wholly owned subsidiary in the USA in February 2001.

The beneficiary's United States duties are described, in pertinent part, as follows:

> Term of Employment
>
> We offer [the beneficiary] full time temporary employment at an annual salary of $60,000. Once the operations of the company are fully established and the company has proven successful in the U.S. market, it is planned to have [the beneficiary] return to China to resume her position as the President of our parent company.

The petitioner submitted an organizational chart for the foreign entity, but did not submit a description of the duties of any of the employees listed.

In response to a Bureau request for additional evidence dated June 26, 2001, the petitioner submits, in part, the following:

Statement of position description for all [the] proposed employees in the United States and the breakdown of the number of hours devoted to each of the employee's job.

1. Administrative assistant: Provided high-level administrative support by conducting research, preparing statistical reports, handling information requests, and performing clerical functions such as preparing correspondence, receiving visitors, arranging conference calls, and scheduling meetings. Approximately 8 hours a week devoted to this staff.

2. Sales Manager: Directs actual distribution or movement of the products. Coordinate sales distribution by establishing sales territories, quotas, and goals and establish training programs for sales representatives. Analyze sales statistics gathered by staff to determine sales potential and inventory requirements and monitor the preferences of customers. Approximately 8 hours a week devoted to this staff.

3. Sales Representatives: Sell goods for [sic] wholesalers businesses or groups of individuals. No more than 2 hours a week devoted to these staffs [sic].

4. Import and Export Specialist: Direct to report [sic] to the customs for incoming goods and make payment for the tariffs, inspect and collect the letter of credit, direct and arrange the storage and transportation, research the import and export policies especially for quotas for importing textile products. Approximately, 4 hours a week is devoted to this staff.

5. Import and Export Assistant: under the supervision of the Import And Export Specialist, assist the specialist to report to the customs [sic], make the payment for the duties, inspect and collect L/C, arrange the storage and transportation, and other jobs assigned by the specialist. No more than 2 hours a week devoted to this staff.

6. Bookkeeping, Accounting,and Auditing Clerk: Compute, classify, and record numerical data to keep financial records complete. Perform any combination of routine calculating, posting, and verifying duties to obtain primary financial data for use in maintaining accounting records. 2-4 hours a week devoted to this staff.

7. Stock Clerks: receive, store, and issue sales floor merchandise. Stock shelves, racks, cases, bins, and tables with merchandise and arrange merchandise displays

> to attract customers. Periodically, take physical count of stock or check and mark merchandise. No more than 2 hours a week devoted to this staff.

On appeal, counsel states that the director erroneously ignored the aforementioned position descriptions in rendering his decision, emphasizing that the hourly figures quoted reflect the amount of time spent each week by the beneficiary with each of those positions. Counsel further asserts that this "business plan" clearly establishes the beneficiary's "supervision and control of the work of other supervisory, professional or managerial employees."

The record is devoid of sufficient information describing exactly what the beneficiary did as president of the foreign entity. Despite counsel's contentions, the evidence provided is deficient in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. While counsel notes that the "business plan" clearly establishes the beneficiary's "supervision and control of the work of other supervisory, professional or managerial employees," the plan indicates that the maximum number of hours reflected is 30 hours per week and that at least 22 of those 30 hours would be involved with work of non-supervisory employees. Such claim must be taken into consideration when determining whether the beneficiary's position is managerial or executive. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary has been or will be performing in a primarily managerial or executive capacity. The majority of the beneficiary's duties, as described, are not managerial or executive in nature.

The petitioner has provided no detailed description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title. Further, the petitioner's evidence is not sufficient 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 nonqualifying duties.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this additional 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.