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U.S. Department of Justice

Immigration and Naturalization Service

**PUBLIC COPY**



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

16 DEC 2002

File:

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Vermont Service Center.<sup>1</sup> The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a corporation that claims to be engaged in international trade and real estate development. It seeks to employ the beneficiary as its president. Accordingly, it seeks classification of the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had worked for the same employer or an affiliate or subsidiary of the claimed foreign entity while in the United States. The director also determined that the petitioner had not established that the beneficiary had been or would be working in a managerial or executive capacity for the petitioner.

On appeal, the petitioner asserts that the beneficiary has been working for an affiliate of the petitioner while in the United States. The petitioner also asserts that the beneficiary plays an important role in its business.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers.  
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

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<sup>1</sup> The record includes a petition filed by this petitioner for this same beneficiary also under section 203(b)(1)(C) dated November 25, 1998 that was denied by the Director, Vermont Service Center on August 8, 1999.

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

The first issue in this proceeding is whether the petitioner has provided sufficient evidence to demonstrate that the beneficiary has worked for an affiliate of the claimed overseas entity and whether the petitioner has further complied with 8 C.F.R. section 204.5(j) (3) (i) (B) as detailed above.

The petitioner provided copies of purported payroll records of the claimed foreign entity that indicated the beneficiary was paid by the claimed foreign entity during the years 1994 and 1995. The petitioner states that the beneficiary first entered the United States in April of 1996 to set up subsidiaries for the petitioner's claimed parent company. The petitioner notes that the beneficiary traveled back and forth between China and the

United States during the months of May, August, and December for this purpose. There is no documentation detailing how or if the beneficiary was paid during this time period. The director notes that Service records show that the beneficiary was in B-1 visa status during this time period.

The director states that Service records show that the beneficiary was granted L-1A non-immigrant status in November of 1996 and that the L-1A visa was issued in March of 1997. The petitioner for the L-1A visa is identified as Wonrae, Inc. The petitioner asserts that Wonrae, Inc. is its affiliate as it is also owned by its claimed parent company. The petitioner provides copies of the beneficiary's passport and indicates that the beneficiary entered and departed the United States as an L-1A non-immigrant as follows:

Entered June 30, 1997 - Departed September 27, 1997  
Entered November 25, 1997 - Departed February 12, 1998  
Entered May 8, 1998 - Departed August 8, 1998  
Entered December 23, 1998 - Departed February 1, 1999  
Entered May 9, 1999 - Departed July 16, 1999, and  
Entered August 22, 1999 - until present.

The director notes Service records depict the beneficiary's entry into the United States in May of 1999 departing July 14, 1999 and entering again in August 25, 1999 and staying to present. The director also notes that the beneficiary's L-1A status expired November 17, 1999 and was formally revoked based on fraud in December of 1999. This office has no record that the L-1A revocation was appealed.

The petitioner also provided its Internal Revenue Service (IRS) Form W-2s, Wage and Tax Statement for 1999. The beneficiary's 1999 W-2 indicates the petitioner paid the beneficiary \$32,000 for that year. The letter in support of the petition filed on February 23, 2000 states, however, that the beneficiary was appointed vice-president of Wonrae, Inc. in 1996 and that the "U.S. company intends to transfer [the beneficiary] from our affiliated company to [the petitioner] in New York as President."<sup>2</sup>

The director determined that the petitioner had not shown that the beneficiary was employed by a qualifying organization in the United States since 1996. The director noted that based on Service records, the beneficiary had only been in the United States in L-1A non-immigrant status for a nine and a half-week period and a twelve and a half-week period in 1999. The director determined the record was deficient in establishing the beneficiary's employment history for the three years previous to the date of his decision. The director further determined that

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<sup>2</sup> The first petition filed November 25, 1998 uses the same language regarding the beneficiary's employment and proposed position.

the record did not demonstrate that Wonrae, Inc. and the petitioner were affiliated by virtue of being owned and controlled by the same foreign parent. The director also noted that the petitioner's 1997 IRS Form 1120, U.S. Corporation Income Tax Return revealed payment to the beneficiary of \$16,000 at a time when the beneficiary worked for another organization and apparently had not been in the United States.

On appeal, the petitioner states that the "Lusha [sic] Group is a conglomerate multi-billion business mainly in development and in diversified industries as well." The petitioner indicates that its claimed parent company attempted to expand into the international market and set up Wonrae, Inc. to engage in real estate development and set up the petitioner to import construction equipment and supplies for Nanning City Decoration Company, a division of the claimed parent company. The petitioner states that "Wonrae could not realize its business goal as originally designed while [the petitioner] found its market niche for success. Based on this change the parent company . . . assigned [the beneficiary] to manage [the petitioner]." The petitioner also provided a copy of a letter dated October 1999 from an unrelated trading company identifying the beneficiary as the representative of the petitioner since 1997.

Upon review of the record, the petitioner's attempt to explain the beneficiary's employment in the United States is woefully inadequate. Based on the petitioner's statements the beneficiary has been working for Wonrae, Inc. since 1996. However, based on the petitioner's IRS Forms 1120 and W-2s, the petitioner, not Wonrae, Inc., paid the beneficiary in 1997 and 1999. The record does not contain information regarding the beneficiary's salary in 1998. To further confuse matters, the petitioner provided a letter from a representative of an unrelated trading company stating that the beneficiary had been the representative of the petitioner since 1997. 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 petitioner has not adequately explained why it would pay the beneficiary when the beneficiary was allegedly working for another company. In addition, the petitioner has not provided documentary evidence to establish that it is affiliated with Wonrae, Inc. Further, the petitioner has not provided supporting documentation of the beneficiary's activity in the United States since the expiration and revocation of the L-1A non-immigrant status. 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). Finally, and most importantly, the petitioner has not established that the beneficiary was working for the claimed foreign entity for one year in a managerial or executive capacity prior to her

entry into the United States as a non-immigrant. The petitioner has provided an unsubstantiated organizational chart and payroll records and a statement that the beneficiary worked for the claimed parent company as manager of the financial department of the claimed parent entity. In light of the undocumented and inconsistent information regarding the beneficiary's past and present status in the United States, the record requires independent evidence to overcome the director's decision on this issue. The petitioner has not provided the required evidence set out in 8 C.F.R. section 204.5(j)(3)(i)(B). The petitioner has not established that the beneficiary is in the United States currently in a valid non-immigrant status. The petitioner has not provided sufficient evidence to establish that the beneficiary was employed by the claimed foreign entity in a managerial or executive capacity for one year prior to entering the United States as a non-immigrant.

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

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.

The petitioner initially submitted a letter from its business representative stating generally that the beneficiary would have managerial employees reporting to her, that she would exercise authority in regard to hiring, firing, training, that she would be responsible for managing and directing the financial and accounting matters, and would have autonomous control over, and exercise wide latitude in discretionary decision-making.

The beneficiary as the president of the petitioner in an office memo dated October 1, 1998 provided the following job description for her position:

1. Company strategic planning and budgeting
2. Financial management, banking and accounts payable
3. Personnel management and payroll
4. Taxation and any other issues related to government and public
5. Coordination with overseas suppliers and manufacturers
6. Reports to headquarters
7. Approval of any expenses but over \$500.00 in the field of marketing

The petitioner also provided the following breakdown of the beneficiary's duties on a weekly basis:

Review of business reports	2 hours
Accounts payable	4 hours
Banking	4 hours
Payroll and personnel management	2 hours
Communication with headquarters and overseas associates	2 hours
Routine company meeting	2 hours

Public and business relations	4 hours
Routine business decision making	4 hours
Review purchase orders and coordinating with suppliers	6 hours
Office routines	4 hours
Assisting sales operation	6 hours

The director, in his notice of intent to deny, requested the petitioner provide a complete position description for all of its employees including the beneficiary's position.

In response, the petitioner listed the job duties of president as follows:

Establishing organizational goals, policies and plans	4 hours
Making fundamental business decisions	4 hours
Reviewing statements and reports	4 hours
A/P	2 hours
Cost accounting & financial analysis	8 hours
Banking	2 hours
Negotiating w/ suppliers & purchasing	8 hours
Reporting to headquarters	2 hours
Supervising subordinates and subsidiaries	4 hours
Business related social activities	2 hours

The petitioner also submitted its organizational chart depicting the beneficiary's position of president. The chart also depicted a vice-president, a sales department manager, a warehouse supervisor, and a bookkeeper.

The director determined that the record did not demonstrate that the beneficiary had been and would be employed in a primarily executive or managerial capacity. The director concluded that the beneficiary had been and would be engaged primarily in the non-managerial, day-to-day operations involved in producing a product or providing a service.

On appeal, the petitioner conceded that in a business with less than ten employees, the managerial duties were mostly operational. The petitioner explained that the beneficiary as the person most trusted by the foreign entity necessarily was required to perform certain operational duties. The petitioner concluded by stating that the beneficiary played a very important role in the business.

The petitioner has not submitted sufficient evidence with the petition nor the notice of appeal to overcome the director's decision on this issue. The description of the beneficiary's duties and responsibilities is general in nature and does not describe in detail the beneficiary's duties on a day-to-day basis. In addition, the beneficiary's description of her job duties in an office memo and the petitioner's breakdown of the beneficiary's weekly duties are inconsistent. Further, the breakdown of the

beneficiary's weekly duties provided in response to the director's notice of intent to deny provides yet another view of the beneficiary's duties. As stated above, it is incumbent upon the petitioner to provide consistent, objective evidence. Matter of Ho, supra. The record does not provide a comprehensive consistent description of the beneficiary's duties for the petitioner.

In addition, as determined by the director and confirmed by the petitioner on appeal, the majority of the beneficiary's duties are operational in nature. The several descriptions of the beneficiary's duties all describe duties that are more indicative of an individual providing services to the enterprise rather than primarily directing or managing the enterprise. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are general in nature and the various descriptions provided are inconsistent. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner has not provided sufficient evidence that it has the ability to pay the beneficiary the proffered wage of \$42,000 per year. The petitioner has not provided evidence that it has paid the beneficiary \$42,000 in the past. Further, the petitioner has not provided independent evidence that at the time the petition was filed it had the ability to pay the beneficiary the proffered wage.

Also beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with a foreign entity. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or

subsidiary of the overseas company.

The petitioner has provided inconsistent information on this issue as well. The petitioner initially provided a copy of its stock certificate number one issued in the amount of 200 shares to Liu Sha Group, China. The stock certificate is dated September 10, 1996. The petitioner also provided a filing receipt from the state of New York, showing that the petitioner had authorized the issuance of 200 shares of non par value stock. On appeal, the petitioner provides a copy of its stock certificate number one issued in the amount of 110 shares to Nanning City Decoration Company. The stock certificate is also dated September 10, 1996.

Case law confirms that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of a immigrant visa classification. Matter of Church of Scientology International, supra; see also Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant proceedings); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant proceedings).

The petitioner has submitted inconsistent documentation regarding its ownership and control. It states that it is a subsidiary of a foreign entity but submits inconsistent documentation regarding the name of the foreign entity. Furthermore, both stock certificates are numbered "1" and are dated the same day. This casts significant doubt on the legitimacy of either stock certificate. With the apparent indiscriminate use of stock certificates and with no other independent supporting documentation, the Service is unable to determine the elements of ownership and control in the present petition. Upon review, the petitioner has not established that a qualifying relationship exists between the petitioner and the claimed Chinese company or companies.

For these additional reasons the petition may not be approved.

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, the petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.