



U.S. Citizenship
and Immigration
Services

B4



FILE: WAC 02 094 55735 Office: CALIFORNIA SERVICE CENTER Date: AUG 19 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

DISCUSSION: The director denied the employment-based preference visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a California corporation that seeks to employ the beneficiary as its general manager. The petitioner, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C).

The director denied the petition because: (1) the proffered position in the United States is not in an executive or managerial capacity; and (2) there is no evidence of a qualifying relationship between the petitioner and the foreign entity that previously employed the beneficiary.

On appeal, counsel submits new evidence as well as evidence already included in the record of proceeding. Counsel does not submit a brief or a statement that addresses the director's findings.

Section 203(b) of the Act, 8 U.S.C. § 1153(b), 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.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. 8 C.F.R. § 204.5(j)(1). No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in an executive or managerial capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The petitioner avers that it: (1) is a subsidiary of Zhuhai Nancheng Trade Development Corp. (Nancheng Trade) of the People's Republic of China (China); (2) locates and exports autorobots, magnetic cores, cable ties, and optical cables for Nancheng Trade; (3) and employs seven persons, including the beneficiary who is currently occupying the proffered position as an intracompany transferee (L-1A). The petitioner is offering to employ the beneficiary permanently at an annual salary of \$50,000.

The first issue to be discussed is whether the proffered position of general manager is in a 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.

When filing the I-140 petition, the petitioner described the beneficiary's job with the U.S. entity as follows:

His duties include soliciting commissions from . . . clients to buy American products; finding appropriate suppliers, ensuring delivery and shipment, inspect[ing] shipment if necessary, negotiating contracts, networking with agents and brokers to find the supply sources;

arrang[ing] for freight forwarding and customs/tariff work, [and] negotiating for letters of credit and banking facilities both overseas and in the U.S.

[The beneficiary] will plan, develop and establish the import-export activities of the company. He maximizes profit for the company; makes and implements budgetary decisions and financial projections of gross sales; makes and implements company's import-export policies; coordinates with purchasing office of our parent company to determine business needs and course of future business development. He will recruit and supervise sales employees. . . .

The petitioner stated further that in addition to the beneficiary, it employed five persons, whose names and job titles were as follows: [REDACTED] assistant import-export manager; [REDACTED] import-export manager; [REDACTED] sales account executive; [REDACTED] sales/office manager; and [REDACTED] office/warehouse.

In a March 20, 2002 request for evidence (RFE), the director asked the petitioner to submit a more detailed description of the beneficiary's proposed duties, and an organizational chart that listed the company's employees and their job titles.

Part of the petitioner's response to the director's RFE was a list of the beneficiary's duties, which included tasks such as: "purchasing material and product in USA"; "negotiate terms and prices and sign the purchasing order"; "sell product and sign the sales invoice"; and "prepare the tax information for CPA." Counsel also described the proffered position. According to counsel, the beneficiary would be responsible for managing the company, conducting market forecasts, analyzing the budget, developing a marketing plan, and supervising staff. Counsel stated that the beneficiary would spend: 30 percent of his time directing the overall management of the company; 10 percent of his time meeting with clients and addressing their problems; 20 percent of his time developing the business, marketing, and attending trade shows; 10 percent of his time speaking with suppliers and the parent company; and 20 percent of his time supervising and evaluating staff.

The petitioner also included the requested organizational chart. The information on the chart differed from the petitioner's initial description of its staffing. According to the chart, the petitioner was organized into departments [REDACTED] who was listed previously as the assistant import-export manager, was now listed under the financial department; her tasks included bookkeeping, payroll, and taxes [REDACTED] who was listed previously as the import-export manager, was now listed under the sales department; his tasks were supervising and coordinating the sales representatives. [REDACTED] who was listed previously as the sales account executive, was now listed under the purchasing department; his tasks were supervising and coordinating clients. [REDACTED] who was listed previously under office/warehouse, was no longer part of the organization. Instead, [REDACTED] was listed under the customer service department, with tasks that included shipping and packing. Finally, the petitioner stated that it hired [REDACTED] in June 2002 as a sales associate; however [REDACTED] was listed previously as the sales/office manager.

The director denied the position because the proffered position is not in a managerial or executive capacity. The director noted that the petitioner's organizational structure and its type of business did not require the

services of an individual who would primarily direct the management of the organization or manage the organization.

On appeal, counsel does not present any statements in rebuttal to the director's findings. Instead, counsel submits documentation which she states "substantiate[s] that the beneficiary . . . is not a first line supervisor, but a manager who manages professional staff." The documents that counsel submits are: (1) job descriptions for [REDACTED] who are now the comptroller and IT manager, respectively; (2) the petitioner's payroll records and DE-6 forms; (3) copies of payroll checks; and (4) pages from the petitioner's website about its products. Counsel maintains that because [REDACTED] had at least baccalaureate degrees, then they are considered to be professional employees.

The evidence in the record fails to establish that the proffered position is in a managerial or executive capacity. The petitioner's depiction of the beneficiary's proposed duties and counsel's depiction of the same job vary significantly. For example, counsel stated in response to the director's RFE that the beneficiary would be responsible for marketing; however, the petitioner never mentioned any marketing functions in the beneficiary's job description. Similarly, counsel stated that the beneficiary would spend 30 percent of his time directing the management of the organization; the petitioner never made such a claim. The AAO gives greater weight to the petitioner's descriptions of the beneficiary's proposed duties. Without documentary evidence to support her claims regarding the beneficiary's alleged duties, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As stated previously, the petitioner is required to furnish a statement that clearly describes the duties to be performed by the beneficiary. 8 C.F.R. § 204.5(j)(5). It appears from the beneficiary's two job descriptions that he will be primarily engaged in performing the services of the petitioner. The petitioner listed such duties as "purchasing material and product in USA," "negotiate terms and prices and sign the purchasing order," "sell product and sign the sales invoice," and "prepare the tax information for CPA." 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 petitioner's staffing level also indicates that the beneficiary will function more as a first-line supervisor rather than as a manager or executive. When responding to the director's RFE, the petitioner presented a different staffing chart than the one submitted with the initial petition. The petitioner now divided its company into departments, and counsel indicated that two of the employees had been promoted to "professional" positions. Citizenship and Immigration Services (CIS) cannot consider any changes to a company's staffing level or organizational structure if such changes occurred after the filing date of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the promotion of two individuals and the division of the organization into departments has no bearing on whether the beneficiary would be employed in a managerial or executive capacity as of the date of filing of the visa petition.

A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner did not provide any job descriptions for its employees except for the beneficiary when it filed the petition. When the petitioner did supply the employees' job descriptions, such job descriptions reflected the employees' new titles, which were changed after the petition was filed. There is no evidence to substantiate the claim that, at the time of filing the petition, employees other than the beneficiary completed the day-to-day non-managerial and non-executive tasks.

On appeal, counsel contends that the beneficiary will work in a managerial capacity because he will supervise two professional employees. Counsel claims that these employees are professional because each individual holds at least a baccalaureate degree. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by the subordinate employee. The possession of a bachelor's degree by an individual does not mean that the individual is a member of a profession, and the petitioner has not shown that the beneficiary supervises a member of a profession as that term is defined in the Act. The petitioner has not shown that the position offered to the beneficiary is in an executive or managerial capacity. The director's decision to deny the petition on this basis shall not be disturbed.

The second and final issue to be discussed is whether a qualifying relationship exists between the petitioner and the foreign entity, Nancheng Trade of China. Pursuant to 8 C.F.R. § 204.5(j)(3)(i)(C), a petitioner must establish that it and the foreign entity share a common relationship.

When filing the petition, the petitioner submitted a copy of stock certificate number one and its corporate stock ledger. Both the certificate and the ledger indicated that on August 13, 1998, Nancheng Trade became the owner of 1000 shares of common stock. The ledger indicated that the petitioner received \$1,000 for the shares of stock. The petitioner also submitted a copy of a wire transfer, dated February 17, 1998, for \$99,985. According to counsel, this wire transfer shows that Nancheng Trade paid for the petitioner's shares of stock.

Counsel stated, "Due to the difficulty of wire-transferring foreign funds out of China, this sum is sent through a Hong Kong affiliate of the parent company."

In the director's March 2002 RFE, he asked the petitioner to submit, among other items, proof of its stock purchase. In response, the petitioner submitted the same copy of the wire transfer. Counsel stated:

Initial investment into [REDACTED] [sic] is \$99,980 as indicated by statement of savings deposit account of [REDACTED]. Due to the fact that it was difficult in 1998 to transfer U.S. dollars directly out of China, Nanchang [sic] appointed a representative to transferred [sic] and deposited [sic] the capital for Townsky into a company account.

In denying the petition, in part, because there was insufficient evidence of a qualifying relationship between the petitioner and [REDACTED] the director noted that stock certificate number one indicated a purchase of the shares of stock on August 13, 1998, yet the wire transfer was dated February 17, 1998. The director stated further that the wire transfer was from [REDACTED] not the foreign entity.

On appeal, counsel submits a letter from [REDACTED] and another copy of the February 17, 1998 wire transfer.

The regulations at 8 C.F.R. § 204.5(j)(2) define a subsidiary, in pertinent part, as a firm, corporation, or other legal entity of which a parent owns directly or indirectly, half of the entity and controls the entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The evidence in the record fails to establish that Nancheng Trade paid for the petitioner's shares of stock. There are several problems with the credibility of the evidence presented. The first problem concerns the stock certificate and the stock ledger. According to the stock ledger, Nancheng Trade paid only \$1,000 for

the shares of stock on August 13, 1998; however, a "Notice of Transaction" in the record indicates that the value of the shares is \$100,000, and the petitioner indicated in its corporate tax return that it received \$100,000 for its common shares of stock.

The second problem concerns the wire transfer. Stock certificate number one was issued on August 13, 1998 and the "Notice of Transaction" was dated August 13, 1998 to verify that on that date, the petitioner received payment for 1,000 shares of its stock. Yet, the wire transfer that the petitioner submits on appeal to show that Nancheng Trade paid for the shares of stock is dated February 17, 1998, almost six months prior to the stock purchase transaction. The petitioner must establish that it received \$100,000 from Shanghai Electronics for the specific purpose of purchasing its shares of stock as of the date that the stock certificate was issued. The February 1998 wire transfer establishes only that an individual [REDACTED] transferred \$99,985 into the petitioner's bank account, not that this money was from [REDACTED] for used to purchase shares of the petitioner's common stock.

The third problem concerns the petitioner's evidence on appeal regarding the wire transfer. This evidence consists of a letter from [REDACTED] dated February 17, 1998, which states, "We, [REDACTED] hereby authorize [REDACTED] to transfer USD 100,000 . . . to [REDACTED] in the United States as investment." Neither [REDACTED] nor the petitioner identifies [REDACTED] and his relationship to [REDACTED]. The letter states only that Nancheng Trade "authorizes [REDACTED] to transfer money, not that the funds that [REDACTED] transferred came from [REDACTED]. This letter is also inconsistent with a prior statement of counsel's. When filing the petition, counsel stated that the money for the shares of stock "is sent through a [REDACTED] of the parent company." Counsel did not mention that an individual named [REDACTED] was involved in the transaction.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The documentation in the record does not establish that the petitioner is a subsidiary of Nancheng Trade, in that Nancheng Trade owns and controls this particular U.S. entity. Simply asserting that Nancheng Trade owns a majority of the petitioner's shares of stock is not enough. The petitioner must establish not only the exact percentage of Nancheng Trade's ownership interest in the U.S. entity, but also show that it paid for the petitioner's shares of stock when the stock certificates were issued. As the petitioner has failed to establish that it is a subsidiary of Nancheng Trade, the director's decision to deny the petition, based in part on this issue, shall not be disturbed.

Beyond the director's decision, because the petitioner has not established the existence of a qualifying foreign entity, the beneficiary cannot meet the requirement of 8 C.F.R § 204.5(j)(3)(i)(B), which states that the beneficiary must have been employed by the qualifying foreign entity in a managerial or executive capacity for at least one year in the three years immediately preceding his entry into the United States in a nonimmigrant status. Although the director did not discuss this issue in his denial letter, it is another reason why the petition may not be approved. Without a qualifying foreign entity, the beneficiary cannot have the necessary work experience as discussed in the cited regulation.

WAC 02 094 55735

Page 9

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. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.