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U.S. Department of Justice

Immigration and Naturalization Service

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

[Redacted]

APR 23 2001

File: WAC 99 191 53106 Office: California Service Center

Date:

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

Identifying information is redacted 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

Ermya L. Rosenbey
for Robert P. Wiemann, Acting 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, an international trading company, seeks authorization to employ the beneficiary temporarily in the United States as chief executive officer/general manager of its new office. The director determined that the petitioner had not established that the petitioner is doing business, that the beneficiary would be employed in a primarily executive capacity, or that there is a qualifying relationship between the U.S. and foreign entities.

On appeal, the petitioner argues that the beneficiary is employed in a primarily managerial or executive capacity and that there is a qualifying relationship between the U.S. and foreign entities.

It is noted that the issue raised by the director regarding whether or not the petitioner had submitted insufficient evidence to establish that it is doing business is not an issue that relates to a petition for a new office. Accordingly, this issue will not be addressed in this proceeding.

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 (1)(3)(v) states 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 (1)(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 1999 and that it is a subsidiary of [REDACTED], Ltd., located in China. The petitioner declares three employees and a gross annual income of approximately \$10,000,000. It seeks authorization to employ the beneficiary for three years at an annual salary of \$32,000.

The first issue in this proceeding is whether the beneficiary will be employed in a primarily 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.

In a letter dated August 19, 1999, the Service requested that the petitioner respond to the following:

BENEFICIARY'S DUTIES: Please clarify in detail the specific nature of the alien's prospective duties in the U.S. (What exactly will she be doing? How many employees will she be supervising? Number of current employees in the U.S.? Number and types of employees to be hired?[])

* * *

A hiring plan to show that within one year from the date of approval of the petition, the beneficiary will have a supporting staff?

* * *

Submit a list of all employees from the date of establishment to the present, including: names; job

titles, Social Security number, Nonimmigrant status (L-1, H-1B[,] etc.), beginning date and ending date of employment, wages per week[,] etc.

The petitioner submitted an organizational chart showing the following employees:

CEO/General Manager: [REDACTED]

Vice General Manager: [REDACTED]

Director Office/Officer Manager: [REDACTED]

Finance Dept./Dept. Manager: [REDACTED]

Technical Support Dept./Dept. Manager: [REDACTED]

Import & Export Dept./Dept. Manager: [REDACTED]

The petitioner submitted the following description of its employees' duties:

CEO/General Manager

- 1) Have executive responsibility of planning, directing, and managing overall business operations of the U.S. company;
- 2) Plan, administer and develop company's commercial and financial goals and objectives;
- 3) Exercise discretion over the day-to-day operations of the business activities;
- 4) Exercise discretion over the operations of Finance Department and Import and Export Department;
- 5) Supervise and schedule the work of employees;
- 6) Exercise authority to hire/fire executive staff;
- 7) Report to parent company on business situation of the U.S. company.

Vice General Manager

- 1) Assist the General Manager to make short-term plan of 2 years for the U.S. company's development;
- 2) Establish business strategy and evaluate all the commercial contracts;
- 3) Render overall management and supervision to Finance Department, and Import/Export Department.
- 4) Exercise authority for hiring/firing staff;
- 5) Report to President on business operations.

Director Office Manager;

- 1) Have managerial responsibility for planning, directing and managing overall administrative and financial activities of the U.S. Company'
- 2) Supervise the daily operations for the company;
- 3) Report to General Manager and Vice General Manager on the operations situation

Finance Department Manager:

- 1) Having managerial responsibility of planning, directing and managing overall financial activities of the U.S. subsidiary;
- 2) Direct employees to keep and maintain correct accounts of the properties and business transactions of the U.S. company, open to inspection by General Manager;
- 3) Direct employees to make annual/quarterly cost analysis

Technical Support Department Manager

- 1) Oversee project investment plan and carry out the project;
- 2) Preparing for the pre-design and technical research, contract negotiation;
- 3) Control and manage the progress, quality and safety of programs;
- 4) Take charge of selecting the staff of engineering division for every project.

Import & Export Department Manager:

- 1) Have managerial responsibility of planning, directing and managing overall import & export activities of the U.S. Subsidiary;
- 2) Direct employees to negotiate and sign contracts with customers;
- 3) Direct employees to go through customs formalities;
- 4) Exercise the authority of hiring & firing employees of the subordinate department;
- 5) Report to the Vice General Manager on the business situation.

It is noted that the petitioner submitted another organizational chart and description of duties in which the beneficiary was referred to as the president, and that Dan Gu Zhao was referred to as the vice president.

On appeal, the petitioner claims that it has hired two additional employees, and that the beneficiary is employed in a managerial or executive capacity. The petitioner does not state the job titles of its two new employees, nor does it provide a description of their duties.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as having executive responsibility for planning, directing, and managing business operations; planning, administering, and developing the company's commercial and financial goals and objectives; exercising discretion over the day-to-day operations of the business; and reporting to the parent company, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as supervising and scheduling the work of employees have not been demonstrated to be managerial or executive in nature. It is unclear to what extent the beneficiary is relieved from performing nonqualifying duties, since some of her duties appear to overlap with those of her subordinates. The beneficiary, the director office manager, and the finance department manager all appear to be responsible for planning the U.S. entity's financial activities. Further, although the beneficiary is stated to be the chief executive officer and general manager, she is also the sole employee within the technical support department, and the sole employee within the import/export department. The use of the position title of "general manager" is not sufficient.

Further, it is unclear to what extent the beneficiary will actually spend her week working for the U.S. entity as a chief executive officer/general manager, or working within the technical support and import/export departments. According to records generated by Mt. San Antonio College, the beneficiary enrolled in an English as a second language class from 8 A.M. to 11 A.M., Monday through Friday, from August 16, 1999 to December 19, 1999.

The record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary 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 will be managing a subordinate

staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties.

Based on the evidence furnished, it cannot be found that the beneficiary will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The other issue in this proceeding is whether there is a qualifying relationship between the U.S. and foreign entities.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

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 (1)(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.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

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

8 C.F.R. 214.2(l)(1)(ii)(J) states:

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

8 C.F.R. 214.2(l)(1)(ii)(K) states:

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) states, 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 submitted share certificate number 1 showing that as of April 8, 1999, Talent Technology Development Co., Ltd. owns 51,000 of 100,000 authorized shares of the U.S. entity's stock, and share certificate number 2 showing that the beneficiary owns 49,000 shares of stock.

The petitioner also submitted a wire transfer showing that on April 20, 1999, [REDACTED] Co. sent \$100,000 to the U.S. entity through an account at East-West Bank in Rowland Heights, California. Although the message on the wire transfer says that this money constitutes the foreign entity's initial investment in the U.S. entity, there is no independent evidence showing that the foreign entity, directly or indirectly, provided the U.S. entity with any money either for investment in the U.S. entity, or for stock purchase. On appeal, counsel claims that the foreign entity retained [REDACTED], Ltd. to transfer the sum because of "the foreign currency control policy in China." There is no evidence that the foreign entity ever provided [REDACTED] Ltd. with any funds or collateral in order to arrange a transfer of \$100,000 to the U.S. entity.

Regulations 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 nonimmigrant visa petition. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); see also Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, 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. Id.

In a non-immigrant petition for an intracompany transferee, 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, the Service is unable to determine the elements of ownership and control.

Furthermore, a certificate of stock is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. Black's Law Dictionary (Fifth Edition, West Publishing Company, 1979). The regulation at 8 C.F.R. 103.2(b)(8) specifically allows the director to request additional evidence in appropriate cases. As ownership is a critical element of this visa classification, the Service may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. The petitioner was requested to submit evidence that the U.S. and foreign entities are qualifying organizations. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. There is no such evidence within the record. The petitioner has submitted insufficient evidence to establish that the foreign entity owns and controls the U.S. entity. Accordingly, it cannot be determined whether there is a qualifying relationship between the U.S and foreign entities. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to demonstrate that the beneficiary's employment in the United States will be temporary. Matter of Isovich, 18 I&N Dec. 361 (Comm. 1980); 8 C.F.R. 214.2(1)(3)(vii). Further, it is unclear whether the petitioner has been employed by the foreign entity for one continuous year within the three-year period preceding the filing of the petition. Further, As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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.