

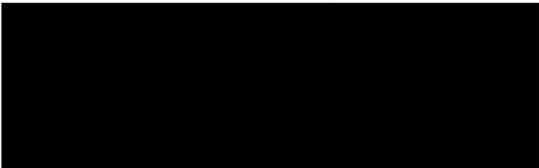


U.S. Department of Justice

Immigration and Naturalization Service

Public Copy

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



05 DEC 2001

File: WAC 99 223 53463 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner  
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:



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. Weimann, 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 is described as an import and export wholesaler and retailer of fine jewelry and mineral materials. The petitioner seeks to continue the employment of the beneficiary in the United States as its manager. The director determined that the petitioner had not established a qualifying relationship with the foreign entity and had failed to demonstrate that the beneficiary had been functioning and would continue to function in a primarily managerial or executive capacity.

On appeal, the petitioner disagrees with the director's determination and submits further evidence for consideration.

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) 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 (1)(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 United States petitioner is a limited liability company organized in the state of Arizona in February of 1996. The foreign entity is a Chinese corporation that specializes in mining, supplying, processing and selling Chinese jewelry, gems, minerals and arts and crafts. The petitioner is requesting the continuation of the beneficiary's employment as its manager.

The first issue in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

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

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

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

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

8 C.F.R. 214.2(1)(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(1)(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.

In this case the petitioner submitted the prior approval notice, tax returns and payroll reports among other documents with the extension petition.

The director requested additional evidence to establish the ownership and control of the petitioner, including wire transfers and cancelled checks to verify that all the partners of the limited liability company had actually contributed capital in exchange for ownership and control of the petitioning entity.

In response, the petitioner submitted the petitioner's operating agreement, notice of filing of articles of organization, original bank statements, cancelled checks and receipts. The petitioner also included minutes of a meeting of the members of the petitioner changing the location of the business and appointing the beneficiary as the general manager of the company.

The director determined that the ownership and control of the petitioner had not been established. Upon reconsideration of the petitioner's application, the director again found that there was insufficient information in the record to establish ownership of the petitioner.

On appeal, counsel asserts that the petitioner has provided adequate documentation of the ownership and control of the United States entity. Counsel also asserts that the ownership of the United States entity must be viewed in context of the Chinese government's foreign currency controls.

On review, the record as presently constituted is not persuasive in demonstrating that a qualifying relationship exists between the petitioner and the foreign 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 the United States entity and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings).

As noted by the director, the petitioner has provided inconsistent information regarding the actual ownership and control of the petitioner. The initial evidence submitted with the petition indicated that the petitioner is 90 percent owned by Zhengzhou Ande Jewelry & Mineral Ltd. (Zhengzhou), a Chinese corporation. The petitioner further claimed that an individual, Weiji Cheng owned the remaining 10 percent of the petitioner. Yet the notice of filing of articles of organization indicates that Qizhou Chen, Weiji Cheng, Feng Chen and Zhengzhou Ande Jewelry & Mineral Ltd., are each members of the petitioner and each own greater than 20 percent of the petitioner. The petitioner purports to be a subsidiary of Zhengzhou and yet the true ownership of the

petitioner has never been clarified. Counsel confirms these inconsistencies on appeal. Counsel's explanation of the discrepancy is that Zhengzhou paid for its interest in the petitioner with the transfer of raw material and not with money and thus cannot establish ownership with bank statements or cancelled checks. However, whether Zhengzhou paid for its interest with raw material or money is not the issue of interest, instead the issue is whether Zhengzhou owns a controlling interest in the petitioner. Again, the information that has been provided on this issue is confusing at best and does not support the conclusion that the petitioner is a subsidiary of Zhengzhou, the foreign entity in this case. 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 second issue in this proceeding is whether the petitioner has established that the beneficiary has been 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.

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

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the petition, the petitioner described the beneficiary's job duties as managing and directing sales and manufacturing. The director requested the petitioner provide an organizational chart describing its managerial hierarchy and staffing levels, including a detailed description of the beneficiary's job duties. In response the petitioner noted that the beneficiary and one other individual are the petitioner's only employees because the petitioner's business is not labor intensive. In a motion to reconsider, the petitioner added that the beneficiary undertakes the daily operational management of the entire company, sets up the organizational objectives and policies, hires and fires employees, coordinates the petitioner's development with the foreign entity, reviews and supervises the petitioner's accounting system and meets with prospective customers and other individuals. In addition, the petitioner notes that the beneficiary performed most of the company's labor including taking orders, shipping merchandise, attending trade shows and maintaining contact with suppliers.

The director determined that the petitioner had failed to establish that the beneficiary was employed to manage the organization, department, subdivision, function or component of the company. The director also determined that the record did not show that the beneficiary was managing a subordinate staff of professional, managerial or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director affirmed her decision on the motion to reconsider.

On appeal, the petitioner repeats the description of the beneficiary's job duties earlier detailed. Counsel also asserts that the beneficiary exercises an indispensable management function of the company. Counsel further asserts that the

petitioner is a fledging company and should not be penalized for not hiring additional employees for the beneficiary to supervise.

Counsel's assertions are not persuasive. The record reflects that the beneficiary is primarily performing the necessary tasks to sell gemstones and other jewelry. The description of job duties is vague and general in nature, essentially serving to paraphrase the elements of the regulatory definition of managerial and executive capacity. The only description, other than the listing of elements found in the regulation, serves to emphasize that the beneficiary is one of two employees conducting the day-to-day business of the enterprise. Counsel's assertion that the beneficiary manages an indispensable management function is not substantiated in the record. 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). 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).

On review, the record does not establish that a majority of the beneficiary's duties have been or will be directing the management of the organization or managing an essential function of the petitioner. 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).

Finally, counsel's claim that the petitioner should not be required to hire additional employees to demonstrate that the beneficiary is acting in a managerial and executive capacity is adverse to the requirements set out in the regulation. 8 C.F.R. 214.2(1)(3)(v)(C) allows the United States entity one year within the date of approval of the petition to support an executive or managerial position. One way to demonstrate that the company is able to support an executive or managerial position is to employ sufficient staff to relieve the beneficiary from performing non-qualifying duties. The petitioner, in this case, had been in business for three years at the time the petition was filed. Accordingly, the petitioner remains required to provide evidence that it can support an executive or managerial position. In the case at hand, the petitioner has not provided sufficient evidence to demonstrate that it can support such a position.

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.