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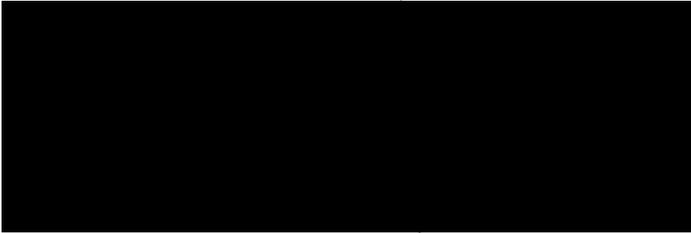
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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



**U.S. Citizenship  
and Immigration  
Services**



FILE: WAC 02 057 53501 Office: CALIFORNIA SERVICE CENTER

Date: **APR 15 2004**

IN RE: Petitioner:  
Beneficiary:



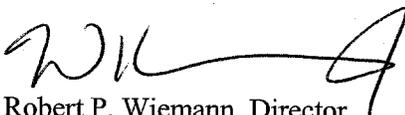
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



**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

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, ZTE Electronics Corporation Inc., states that it is a wholly-owned subsidiary of a Chinese business, Zhejian Tongxiang Electronic Industry Co. The petitioner imports and distributes speakers, microphones, amplifiers, and other similar electronic components. The U.S. entity is incorporated in the State of California. In December 1999, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from December 14, 1999 through December 14, 2001. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for two years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's general manager at an annual salary of \$30,000.

On May 16, 2002, the director determined that the beneficiary did not qualify as a manager or an executive. Consequently, the director denied the petition.

On appeal, the petitioner's counsel asserts that the beneficiary's proposed duties are primarily managerial and executive. Additionally, counsel requests oral argument.

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 meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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 (l)(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.

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 examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive *or* managerial capacity. *Id.* Counsel's brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

Initially, on Form I-129, the petitioner depicted the beneficiary's proposed duties as "managing the entire operation of the subsidiary, including marketing, and operation. Hiring and firing staffs."

The petitioner added in a November 2, 2001 letter that, after transferring to the United States, the beneficiary established the petitioner's sales support department and fully managed the support operation of the petitioner's sales in the United States. The letter further claimed that, in early 2001, the petitioner promoted

the beneficiary to general manager, "in charge of the entire operation of the subsidiary." The letter stated: "[The subsidiary] presently employs two employees."

An organizational chart accompanied the November 2, 2001 letter. The chart depicts the beneficiary as the general manager and as acting "operations." The chart shows the beneficiary as supervising one employee: "Marketing/Sales Chen, Tao." Finally, the schematic presents the beneficiary as overseeing other potential employees: "Administration (To Be Hired)."

On January 29, 2002, the director requested a more detailed description of the beneficiary's proposed job duties, including the percentage of time to be spent on each duty. Additionally, the director asked the petitioner to provide information about Tao Chen, the sales and marketing employee under the beneficiary's direct supervision. Specifically, the director sought information about Tao Chen's job duties and educational level.

On March 21, 2002, counsel responded to the request for evidence: "The beneficiary is in charge of the entire operation of the U.S. subsidiary, including the hiring and firing of employees, and highest-level of discretionary decision[-]making in day-to-day operation." The petitioner presented the beneficiary's specific duties as:

- reviewing general economic conditions (5%);
- supervising the sales and marketing function (20%);
- formulating the sales plan of the subsidiary with the production goal of the parent company and revision thereof (30%);
- supervising the progress of sales (15%);
- contacting customers' high-level executives (5%);
- directing the resolution of contingencies such as shipping interruptions or collection problems (10%);
- controlling the general expenses of the subsidiary and coordinating with outside accountants regarding financial control of the company (5%);
- directing and controlling any warranty service activities (5%); and
- conducting other miscellaneous activities for which a general manager of a company is generally responsible (5%).

(Bullets added.)

The petitioner described Tao Chen as having graduated from Shanghai Giao Tong University with a degree in foreign trade. "[H]e has been in charge of the sales and marketing function of the subsidiary since its inception, including trade show arrangement[s], direct solicitation, customer contacts, etc."

According to the petitioner's response to the request for evidence, the beneficiary will be "supervising the sales and marketing function," "formulating the sales plan," and "supervising the progress of sales." Therefore, at least 65 percent of the beneficiary's proposed responsibilities will comprise marketing tasks. The beneficiary's other proposed duties will include performing tasks necessary to provide a service or produce a product. For example, the beneficiary will be "contacting customers' high-level executives," "directing the resolution of contingencies," "controlling the general expenses of the subsidiary," "directing and controlling any warranty service activities," and "conducting other miscellaneous activities."

Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. Moreover, an employee who primarily performs the tasks necessary to produce a product or 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). As a result, the duties listed above demonstrate that the beneficiary will not be performing primarily managerial or executive duties.

Additionally, the claimed duties are too broad and nonspecific to convey an understanding of the beneficiary's daily activities. For instance, the petitioner characterized the beneficiary's potential tasks as "managing the entire operation of the subsidiary," "[performing the] highest-level of discretionary decision[-]making in day-to-day operation[s]," and "reviewing general economic condition[s]." The petitioner provided no quantifiable definitions for these tasks.

The AAO further notes that the petitioner generally paraphrased the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. The petitioner, for example, described the beneficiary as being responsible for "the highest-level of discretionary decision[-]making," and the "hiring and firing [of] staff[]."

Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ikea US, Inc. v. INS*, 48 F. Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The record lacks adequate supporting documentary evidence to define the beneficiary's duties as primarily executive or managerial.

Finally, the petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[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).

In this matter, the petitioner supervises one employee, Tao Chen. The relevant question is whether the position that the supervised employee holds requires advanced education. Therefore, even though Tao Chen

has a university degree<sup>1</sup> in foreign trade, Tao Chen's job may not require advanced training. The organizational chart provides no information about the required education for the position that Tao Chen holds. Therefore, it is unclear whether Tao Chen performs tasks that require at least a baccalaureate degree.

Further, the description of Tao Chen's duties is too general to convey an understanding of the marketing and sales position. Counsel does not define in terms of frequencies or examples what the terms "sales and marketing function[s]," "trade show arrangements," "direct solicitation," and "customer contacts" mean. As explained above, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. Moreover, Tao Chen's claimed duties are so similar to the beneficiary's proposed tasks as to suggest that Tao Chen would be unable to relieve the beneficiary of his nonqualifying responsibilities.

Additionally, the petitioner claims that the beneficiary's claimed managerial status stems, in part, from supervising an "administration" staff. However, according to the organizational chart, no administrative staff existed at the time the U.S. entity filed the petition. CIS may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, the future hiring of additional employees cannot show that the beneficiary's proposed duties qualify as primarily managerial or executive.

On appeal, counsel cites several unpublished cases to support its position that the beneficiary is a manager or an executive. Counsel, however, did not attach copies of the cases; therefore, it is impossible to gauge the unpublished cases' relevance. Although AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. 8 C.F.R. § 103.3(c). Consequently, because the cited cases are unpublished, they have no precedential effect in this matter.

In sum, the beneficiary's marketing and production-oriented duties, vaguely defined responsibilities, and supervision of a non-professional, non-managerial employee preclude CIS from classifying the beneficiary as a manager or executive.

The AAO notes that, on appeal, counsel requested oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant oral argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel's brief on appeal identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. The written record of proceeding fully represents the facts and issues in this case. Consequently, the request for oral argument is denied.

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<sup>1</sup> The evidence contains an unattributed translation of Tao Chen's university degree. The lack a certified translation of the university degree casts doubt on its validity. *See* 8 C.F.R. § 103.2(b)(3).

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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 sustained that burden.

**ORDER:** The appeal is dismissed.