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20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



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APR 19 2004

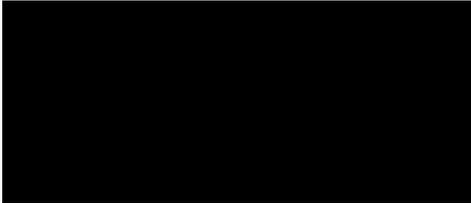
FILE: WAC 02 144 53703 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



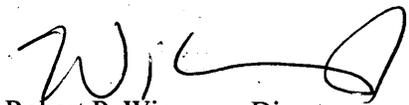
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Streamline Shippers Association Inc., states that it is the parent corporation of a Chinese business, Decheng International Forwarding Co., Ltd., and that that they are a qualifying joint venture. The petitioner states that it is a "full service, non-for-profit, [sic] shippers association." The petitioner now seeks to hire the beneficiary as a new employee. Consequently, in March 2002, the U.S. entity filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for three years. The petitioner seeks to employ the beneficiary as a manager in the U.S. entity at an annual salary of \$30,000.

On May 16, 2002, the director determined, however, that a qualifying relationship does not exist between the petitioner and the Chinese entity. Additionally, the director concluded that the beneficiary will not perform primarily managerial duties in the United States. Consequently, the director denied the petition. On appeal, the petitioner's counsel asserts that the U.S. entity has a qualifying relationship with the Chinese company and that the beneficiary will be employed in a managerial position.

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.

Under 8 C.F.R. § 214.2(l)(3), 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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue the AAO will address is whether the petitioner has a qualifying relationship with the Chinese entity. On appeal, counsel claims the petitioner is in a valid joint venture with the foreign entity. The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(G) *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 (I)(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.

\* \* \*

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

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

(K) *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.* (Emphasis added.)

(L) *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.

Initially, on the Form I-129, the petitioner claimed to be the parent company of the Chinese subsidiary and that it has a qualifying joint venture relationship. In the initial petition, the petitioner submitted relevant evidence regarding the foreign entity which included:

- Certificate of Approval No 0043728 indicating that the foreign entity is a joint venture as follows:
  - Changcheng International Transport Service of China (\$350,000)

- Changcheng Industrial Import & Export Company of China (\$160,000)
- Streamline Shippers Association Inc. of USA (\$490,000)
- An agreement between Changcheng International Transport Service of China (Party A) and Streamline Shippers Association Inc. of USA (Party B), which states in part:

Party A and Party B agree on the following items of mutual management of Decheng International Forwarding Co Ltd (“Dechang”). Party A agrees to authorize Party B to manage and authorize Dechang. Party A has already invested 70 thousand US Dollars to Dechang, Party B agrees to refund the full amount to Party A. Party B shall pay Party A administrative charge RMB 150,000 annually. . . . The agreement is valid for three years . . . .

In his decision, the director stated that CIS recognizes joint ventures as qualifying relationships only in those instances where the joint venture is a 50–50 owned and controlled by two legal entities. The director stated that all other combinations of a joint venture are not qualifying, therefore, the petitioner and the foreign entity do not have a qualifying relationship.

The 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 Scientology International*, 19 I&N Dec. 593, 595 (Comm. 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. *Matter of Church Scientology International, supra*.

On appeal, counsel explains that “[i]n this industry, Chinese regulations do not allow more than 49 % control by foreign investment.” Counsel submits evidence documenting the Chinese regulations. Counsel requests that “in the interests of international comity, [CIS] should define [the foreign entity] as a joint venture because where, as here, conflicting regulations force a business relationship within a certain mold, strict standards should be relaxed as a gesture of courtesy and respect of the legislative, executive, and judicial acts of a political entity.” However, neither the Act nor the regulations permit CIS to disregard regulatory requirements in the interest of international comity. Because the joint venture is not 50–50 owned and controlled by two legal entities, the petitioner and the foreign entity do not have a qualifying joint venture relationship. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K).

In the alternative, counsel requests that the evidence “also supports the characterization of the business relationship of [the foreign entity] and [the U.S. entity] as one of ‘negative control’ as defined under 8 C.F.R. § 214.2 (l)(1)(ii)(K)”, as stated above.

On appeal, counsel explains that the agreement, which is quoted above in part, between Changcheng International Transport Service of China (Party A) and Streamline Shippers Association Inc. of USA (Party B) is proof of the negative control asserted by the U.S. entity. Counsel states that this section of the referenced agreement illustrates “the parties have ceded control of the management and operation of [the foreign entity] to [the U.S entity].” However, the AAO notes that the third owner of the foreign entity is not a party to this

agreement. Additionally, the AAO notes that this agreement also states “Party A and Party B agree on the following items of *mutual management* of [the foreign entity].” (Emphasis added.)

On appeal, counsel asserts “further evidence of negative control is provided by the organizational chart of the [foreign entity] wherein all managers and supervisors of the various branches are hired and fired under the authority and control of [the petitioner.]” Upon reviewing the organizational chart of the foreign entity provided by the petitioner, it is noted that there is no reference to the U.S. entity nor is there a statement saying the U.S. entity has authority and control over the personnel of the foreign entity. 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*, 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). On appeal, counsel states “the finance structure provides an inference that [the petitioner] is the controlling party of the [foreign entity].” However, “an inference” is not sufficient to demonstrate that the minority owner has management and control of the foreign entity.

Based on the record of proceeding, the petitioner has not demonstrated with sufficient evidence that the U.S. entity has ownership and control over the foreign entity. The petitioner has not demonstrated that the U.S. entity has direct or indirect legal possession of the assets of the foreign entity with full power and authority to control. In conclusion, the petitioner has not established a qualifying relationship with the foreign entity.

The AAO also notes that the petitioner submitted several documents in Chinese. Of these documents, some were only partially translated. Additionally, the translator did not provide a certification for all translated documents according to the regulations at 8 C.F.R. § 103.2(b)(3), which states “[a]ny document containing foreign language submitted to the Service shall be accompanied by a full English translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.” For this reason, the AAO does not deem the submitted evidence to be probative.

The AAO now turns to the question of whether the beneficiary will primarily work as a manager.<sup>1</sup> In regard to the issue of whether a beneficiary has been and will be primarily performing managerial duties, 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;

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<sup>1</sup> The petitioner makes no claim that the beneficiary will serve in an executive capacity.

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.

When examining the 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). The petitioner initially listed the beneficiary's title as manager and stated the position's duties as:

[c]oordinate the management of the station; hiring and firing; review, approve and supervise employee's work. Determine efficient routing and operating routes. Direct scheduling of shipments and notify concerned departments or customers of arrival dates. Investigate shipper or customer's complaints regarding lost or damaged merchandise or shortages in shipment to determine company's responsibility. Submit recommendation for development of and compliance with transportation procedures, programs and policies. Evaluate existing procedures in packing, warehousing and loading. Initiate changes to improve control and efficiency in the shipping department.

On April 4, 2002, the director issued a request for evidence regarding the beneficiary's managerial capacity in the United States. The director requested the following:

1. The U.S. entity's organizational chart indicating the beneficiary's position and other named employees in the chart.
2. Provide a detailed description of the beneficiary's specific job duties, including the percentage of time to be spent on each duty.
3. Clearly indicate whether the beneficiary supervises and controls the work of other supervisory, professional, or managerial employees. The evidence should include name, job title and duties, entry date of employment, education level, salaries/wages.
4. Other employees under the beneficiary's supervision in the U.S., including name, job title and duties, entry date of employment, education level, annual salaries/wages.

On or about May 15, 2002, counsel for the petitioner responded to the director's request for evidence. In this response, the petitioner further elaborated on the beneficiary's proposed duties:

[The beneficiary] will coordinate with stations in China. Roughly 30% of the beneficiary's time will be spent on the following duties:

- Direct staff regarding changes in operational procedures in coordination with China stations.
- Instruct staff about responses to questions from Chinese customs, inland transportation, and government regulation.

- Determine efficient routing and operating [sic] routed by coordinating and instructing staff on operations of routing cargo.

[The beneficiary] will evaluate and recommend operational procedures of China operations. About 20% of [the beneficiary's] time will be spent on the following duties:

- Evaluate and initiate changes to improve the control and efficiency of the shipping department. This includes warehousing, trucking, and packing procedures of both China and U.S. offices.
- Submit transportation regulatory requirements and procedures. Direct staff regarding such changes.

Daily operations. About 30% of [the beneficiary's] time will be spent on the following duties:

- Direct staff to resolve issues of scheduling for shipments. Arrival dates, concerns of steamship lines and other operational problems arising from shipments. Coordinate management between offices in China and the U.S.

Administrative duties. About 20% of [the beneficiary's] time will be spent on the following duties:

- Assigning staff to new jobs as necessary.
- Hiring firing as needed.
- Reviewing, approving, and supervising employees' work and personnel relationships within group and between departments in China and U.S.

Finally, in response to the request for evidence, the petitioner submitted an organizational chart. The chart depicted the beneficiary as supervising a team leader for VIP accounts, an export specialist, and two clerks. The petitioner provided a description of their job duties and their educational background.

The director determined that the evidence had not established that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The director stated "the beneficiary will be at best employed as a supervisor. Supervisors who plan, schedule and supervise the day-to-day work of nonprofessional employees are not employed in a managerial or executive capacity." The director concluded that the beneficiary will not be employed in a primarily managerial capacity.

On appeal, counsel asserts that the beneficiary will manage professional positions and that the export specialist is a professional position. The petitioner described the export specialist duties as:

[h]andling daily export operations, including quotation of export rates, routing export shipments, preparation of export documentation, clearance of U.S. Customs, providing customers with compliance of U.S. exports regulations, coordination of daily operations between U.S. and overseas offices. He also needs to be responsible for financial settlements with overseas offices for export shipments.

When examining the managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The duties listed for the beneficiary's position such as "determine efficient routing and operating routed by coordinating and instructing staff on operations of routing cargo" and "evaluate and initiate changes to improve the control and efficiency of the shipping department . . . [t]his includes warehousing, trucking, and packing procedures of both China and U.S. offices" demonstrate that the beneficiary is actually performing the services of the petitioner. The description of the beneficiary's duties and responsibilities indicates that the beneficiary is providing the necessary services to the petitioner to allow continued operation. 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).

Additionally, on appeal, counsel now asserts that the beneficiary manages the essential function of the operational procedures of the Chinese and U.S offices. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

Counsel states that the letter from the general manager of the petitioner "explains the reasons behind the essential nature of the [b]eneficiary's proposed position and the necessity of having the [b]eneficiary fill that position." 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). After reviewing the petitioner's letter, the AAO notes that the petitioner did not specifically identify the claimed function that the beneficiary manages, explain how it is essential, or even mention the term "essential function." The petitioner has not established that the beneficiary is a "function manager."

Regarding the claimed subordinate professional employee, 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 Chin*, 11 I&N Dec. 686 (D.D. 1966).

In evaluating whether the beneficiary manages a professional employee, the AAO must evaluate whether the subordinate position requires a baccalaureate degree as a minimum for entry into the field of endeavor. Based on the descriptions provided by the petitioner and additional information added by counsel, the petitioner has not demonstrated that the export specialist is a professional employee. The petitioner states that the export specialist has a degree in marketing management with a minor in accounting. The petitioner has not

demonstrated that this is knowledge of an advanced type that is a prerequisite to entry into the field of import/export. Additionally, duties such as “preparation of export documentation” and “providing customers with compliance of U.S. exports regulations” are administrative and do not support counsel’s assertion that an export specialist is a professional.

Counsel asserts on appeal, “the beneficiary will be responsible for managing a management analyst, a professional position that places the beneficiary’s position in a managerial capacity.” The AAO notes that this position is vacant. According to CIS regulations, managerial capacity means an assignment that supervises and controls the work of other supervisory, professional, or managerial employees, not merely authority over a vacant position. 8 C.F.R. § 214.2(l)(ii)(B)(1) and (2). Consequently, despite the proposed managerial title, the beneficiary will at most be acting as a first-line supervisor. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A)(iv).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary’s duties will be directing the management of the organization. The beneficiary will not be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve her from performing nonqualifying duties. The petitioner has not adequately identified the essential function that the beneficiary claims to manage. The fact remains that the description of the beneficiary’s primary duties indicates that they are not in a qualifying managerial capacity. For this additional reason, the petition may not be approved.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F. Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.