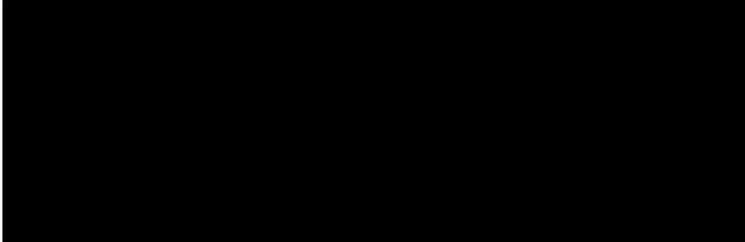


*[Handwritten signature]*

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



U.S. Citizenship  
and Immigration  
Services

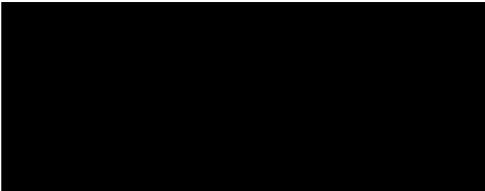


FILE: EAC 02 220 53525 Office: VERMONT SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner: [Redacted]  
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)

ON BEHALF OF PETITIONER:



**PUBLIC COPY**

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prevent clearly unwarranted  
invasion of personal privacy**

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.

*[Handwritten signature]*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Ninestar Technology Company Ltd., states that it is a subsidiary of Zhuhai Ninestar Technology Co., Ltd., located in China. The petitioner plans to import and distribute inkjet cartridges, refill kits, and specialized paper. The U.S. entity was incorporated in the State of New Jersey on June 7, 2001 and has five employees. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, in June 2002, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for one year. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's president and general manager at an annual salary of \$50,000.

On August 7, 2002, the director denied the petition. The director determined that the beneficiary was not employed in a primarily managerial or executive capacity abroad for one continuous year. The director also determined that the petitioner will not support an executive or managerial position within one year.

On appeal, the petitioner's counsel claims that the beneficiary was employed in a primarily managerial or executive capacity abroad for one continuous year.

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.

Pursuant to 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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates 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;

(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 (l)(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.

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.

The issue in this proceeding is whether the beneficiary meets the criteria of 8 C.F.R. § 214.2(l)(3)(v)(b). As previously stated, the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *See id.*

On June 16, 2002, the petitioner stated that the beneficiary was employed abroad by the foreign entity from "July 2000 until now." The petitioner also submitted the beneficiary's resume indicating the beneficiary worked as a sales representative from July 2000 until November 2000, as a sales manager from November 2000 until March 2001, and as an assistant to the president from March 2001 until present. In addition, in a June 10, 2002 letter of support, the petitioner described the beneficiary's foreign duties.

On June 25, 2002, the director requested information concerning the beneficiary's business activities while in the United States in a B-1 status. In particular, the director requested a comprehensive listing of all business activities:

- Evidence of pay receipts, bank deposits, and other evidence of business expenses
- Evidence of contact with the foreign entity such as telephone statements and fax transmissions
- Evidence that the beneficiary purchased her return trip tickets
- Evidence of the beneficiary's application for a visa provided to the U.S. consulate in the beneficiary's home country containing pertinent information regarding the beneficiary's foreign employment
- Evidence of the purpose of the beneficiary's visit to the United States.

In response, the petitioner stated that the beneficiary was sent to the United States on a B-1 visa with "initial duties to direct the implementation and enforcement of [the foreign entity's] quality control policies and sales policies and to provide sales service guidance in the US subsidiaries." In addition, the petitioner stated that the beneficiary attended "two important shows in the industry." The petitioner submitted an employer's letter, telephone bills and other receipts, pay slips, bank statements, airline ticket and payment, and business e-mails. The petitioner claimed that it did not have a copy of the application for the visa provided to the U.S. consulate in the beneficiary's home country.

On August 7, 2002, the director denied the petition. The director found that a consular investigation revealed the beneficiary entered the United States on a C-1 visa by Guangzhou in August 2001 for 12 days. The beneficiary then obtained a B1/B2 visa in September 2001. The investigator found the beneficiary's actual employment was with Greer Magneto-Electric Co. where she worked from July 2000 until October 2001. The investigator called the beneficiary's employer as stated on the beneficiary's visa application and conversed with the personnel manager at Greer Magneto-Electric Co. The personnel manager told the investigator that the beneficiary quit her job in October 2001.

On appeal, counsel states that the director's decision was premised on the investigation report indicating that Greer Magneto-Electric Co. rather than the foreign entity employed the beneficiary. Counsel claims that the beneficiary has been employed in an executive capacity with the foreign entity since July 2000. Counsel claims, "[The beneficiary] actually works for Zhuhai NineStar, the parent, because she has been physically present at Ninestar, she has been paid by Ninestar, and she has been playing an important role in Ninestar's marketing globalization endeavors." Counsel also claims that the beneficiary's personal files were maintained at Greer Magneto-Electric Co. merely for the purpose of receiving her "hu kou" (Chinese government record and working permit) in Zhuhai City. No evidence was submitted on appeal to support the assertion that the beneficiary was physically present at the claimed parent company or was paid by the company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

To explain the discrepancy as to the beneficiary's employment, the petitioner submitted a memorandum outlining how the Chinese "Hu Kou" system affects the beneficiary's employment in a private company. The petitioner explains that Hu Kou is the Chinese law that defines a person's legal residency and eligibility for work. In support of the claim, the petitioner asserts:

Generally, only the state-owned companies and state government as well as government agencies are eligible to apply and ultimately register employees' Hu Kou. To get around this hard issue, it is very common that private companies and foreign companies employee always registers as a state-owned company employee, but actually not work for it. Every year, thousands of college graduates applied jobs in Zhuhai, but only few of them finally have their Hu Kou registered and can legally work in Zhuhai through a state-owned company. [Sic.]

The petitioner claims that the beneficiary has a dual relationship with two employers, but insists that the beneficiary's working relationship is with the claimed foreign parent. In addition, the petitioner submitted a signed statement from an individual who claims to be the personnel employee who responded to the investigator's questions. The individual stated, "Since I did not know the purpose of the investigation, he did not tell the investigator the fact that [the beneficiary] actually does not work in our company, [the beneficiary] only has her personal [sic] file in our company." It is noted that the investigative report does not identify the employee that spoke to the investigator, so the AAO is unable to verify the authenticity of the petitioner's letter. The petitioner also submitted a photocopy of a letter from the purported parent company to the Brazilian embassy in China that identifies the beneficiary as an employee of the company that is traveling to Brazil for a trade exhibition. The letter identifies the beneficiary as the "Assistant General Manager" and states that she had been employed since April 2001. Not only does the letter present a different date for the beginning of the beneficiary's term of employment, but the letter identifies the beneficiary with a different job title.<sup>1</sup>

On review, the AAO finds that the evidence in the record is insufficient to establish the beneficiary was employed by the foreign entity within the three-year period preceding the filing of the petition. The petitioner did not submit independent and objective evidence to overcome the consular investigation. 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).

As an explanation for the investigative report, the petitioner simply asserts that the beneficiary was registered with a company other than the claimed employer in order to circumvent the Chinese employment authorization system. Claiming that the beneficiary perpetrated a fraud in

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<sup>1</sup> It is further noted that the photocopies of the two letters submitted on appeal look suspicious as the letterhead appears to have been superimposed on top of the text at an angle rather than appearing as a uniform letterhead parallel to the text. If the petitioner submits a motion to reopen or resubmits a new petition supported by these documents, the director may request and the petitioner should submit the original documents in order to verify their authenticity. *See* 8 C.F.R. § 103.2(b)(5).

order to circumvent the laws of a foreign government will not serve as an excuse for conflicting evidence and does not bolster either the petitioner's or the beneficiary's credibility. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In addition, the petitioner submitted a letter signed by a claimed personnel employee at Magneto-Electric Co., Ltd. explaining why the employee did not tell the investigator that the beneficiary did not work at Magneto-Electric Co., Ltd. However, the assertions of the letter's author do not amount to independent and objective evidence. Furthermore, the letter does not refer to Hu Kou or state that the beneficiary actually worked for the claimed parent company. Again, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena, supra.*

After careful consideration of the evidence, the AAO concludes that the beneficiary has not been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). For this reason, the petition may not be approved.

The AAO now turns to the question of whether the petitioner provided sufficient supporting information pursuant to 8 C.F.R. § 214.2(l)(3)(v).

Initially, on June 18, 2002, the petitioner described the beneficiary's U.S. duties as:

- Plan, develop, and establish policies and objectives of the company in accordance of the parent company's plan on marketing globalization.
- Develop organizational policies to coordinate the various functions and operations and to establish responsibilities and procedures for attaining objectives.
- Review activity reports and financial status to determine progress and status in at training objectives and revise objectives and plan in accordance with current conditions.
- Direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity.
- Plan and develop public relations policies designed to improve company's image and relations with customers, employees, and public.

- Evaluate performance of company employees for compliance with established policies and objectives and contributions in attaining objectives and make discretionary decisions to hire and terminate employees.

In addition, the beneficiary is described as “will actively supervise the professional staff such as the sales manager to ensure the smooth implementation of the company’s plan.”

On June 25, 2002, the director requested additional evidence:

- How the new company will grow to be a sufficient size to support a primarily managerial or executive position
- Proposed organizational chart for the U.S. entity
- Complete description for the U.S. entity’s future employees
- Evidence such as market analysis, scientific surveys, and other research of market conditions to support the petitioner’s business plan.

In response, the petitioner stated:

Our business plan is based on our intensive marketing research and data analysis. Our first year progress in the U.S. has proved that our business plan is financially sound. As our tax returns shows, our first year sales in the US exceed \$4 million, which is far more over our projection in the plan. Our employees have increased to 6 full-time employees and we are actively hiring/recruiting more qualified workers and staffs. Since [the beneficiary] is the key person for the entire business plan, we are expecting her presence in our business. [The beneficiary] will be primarily responsible for the duties we outlined in our petition letter. We have no doubt that [the beneficiary] will be relieved from day-to-day operation duties within less than one year after her employment.

The petitioner enclosed a supplement to the business plan and job duties.

On August 7, 2002, the director denied the petition and determined the record lacked evidence to establish that the beneficiary will be serving primarily managerial or executive within one year of the operation. The director found the tax return indicated that the petitioning entity may have supported only one full-time employee, who earned much less than a typical administrative officer’s salary.

On review, the petitioner’s business plan and proposed U.S. duties lacks specificity and are vague. For instance, the business plan and proposed duties lists undefined goals as the beneficiary will “plan, develop, and establish policies and objectives of the company in accordance of the parent company’s plan on marketing globalization.” In addition, the business plan provides an explanation of what will happen in the first and second to fifth year. The plan also indicates that the petitioner will “penetrate the local market” and “enter a faster development period.” However, the petitioner

fails to explain any specifics of how it will accomplish these goals. In sum, the business plan and description of the beneficiary's duties are unclear as to how the petitioning entity will support a primarily managerial or executive position within one year of operation.

In addition, the organizational chart and income tax return do not support the position that the beneficiary will be relieved from performing the non-managerial day-to-day operations of the business within one year of operation. On Form I-129, the petitioner indicated that the U.S. entity employs five employees. In response to the director's request for additional evidence, the petitioner claimed to have increased the number of workers to six full-time employees. However, the U.S. organizational chart is unclear as to how many employees the petitioner actually employs. The chart did not indicate the names of any of the current employees or their educational levels. In addition, the U.S. Corporate Income Taxes Form 1120 for 2001 indicated that the employees were paid \$8,000 in salaries and wages from June 7, 2001 until May 31, 2002. However, the AAO questions whether the salaries and wages support the number of employees working for the petitioning entity. The petitioner has not submitted any evidence to resolve this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho, supra*.

Further, the description of the foreign organizational hierarchy does not indicate how the foreign organization supports the U.S. entity. Contrary to the requirements of 8 C.F.R. § 214.2(l)(3)(v)(C)(2), the petitioner did not establish the size of the U.S. investment or the financial ability of the overseas employer to commence doing business in the U.S.

In sum, the petitioner has failed to demonstrate compliance with the new office requirements because of the vague and nonspecific description of the proposed nature of the office describing the scope of the entity, its organizational structure, and organizational structure of the foreign entity.

Beyond the decision of the director, assuming *arguendo* that the beneficiary did perform services for the claimed parent company contrary to the investigative report, the AAO is not persuaded that the beneficiary has been employed in a managerial or executive capacity abroad. See 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). The petitioner submitted a vague and nonspecific description of the beneficiary's foreign duties. For example, on Form I-129, the beneficiary is described as "direct[ing]," "controll[ing] the day-to-day operations," and "sett[ing] up and determin[ing] the major goals for global marketing." The petitioner did not, however, define the beneficiary's goals or explain how the beneficiary will direct or control the business. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In sum, the beneficiary has not been employed in a primarily executive or managerial capacity abroad as required by 8 C.F.R. § 214.2(l)(3)(v)(B). 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.