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FILE: WAC 02 093 54805 Office: CALIFORNIA SERVICE CENTER Date: FEB 5 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:



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 petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is a new office located in California and engaged in the manufacturing, trade, and distribution of home appliances, electronics, and consumer products. The petitioner seeks to employ the beneficiary in the United States for one year as its chief executive officer.

In a decision dated June 5, 2002, the director denied the petition concluding that the beneficiary will not be employed in the United States in a primarily managerial or executive position, and that the petitioning organization has not been doing business in the United States as a qualifying entity. Counsel for the petitioner subsequently filed a Motion to Reconsider, and submitted a brief in support of the motion. Counsel further requested that in the event the motion to reconsider is denied, the brief be considered an appeal of the director's decision. The director denied the motion to reconsider. Therefore, the matter is now before the AAO on appeal.

Counsel asserts in the brief on appeal that the director incorrectly denied the petition because the petitioner had established that the beneficiary would be performing managerial and executive duties while employed at the petitioning company. Furthermore, counsel contends that the petitioner is a qualifying organization that is conducting business in the United States as a new office.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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:
 - a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

- b. 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
- c. the organizational structure of the foreign entity.

It appears from both the director's decision and counsel's brief on appeal that a discrepancy exists regarding the petitioner's status as a new U.S. office. For purposes of clarity, the AAO will first address this issue.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(F) defines a new office as "an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year."

The term "doing business" is defined in 8 C.F.R. § 214.2(l)(1)(ii)(H) as:

The regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In the present matter, the petitioner noted on the petition that the beneficiary was coming to the United States to open a new office, a subsidiary of the foreign company. In an accompanying letter, the petitioner explained that the petitioning organization was established in the year 1999, but that it had not commenced doing business because of economic hardship in the foreign country. The petitioner noted that during this period the U.S. corporation remained in "active status" and "good standing" with the California Secretary of State's office. The petitioner explained that on or about November 2001, the foreign company decided to "utilize the U.S. corporation to conduct a joint venture with a U.S. start-up [company]." The present petition was subsequently filed on January 23, 2002.

The director determined that the petitioner had not established it had been doing business, and thus failed to demonstrate that it was a qualifying entity. The director based his analysis on the fact that the petitioner was incorporated in February 1999, almost three years prior to filing the petition. However, the record supports a finding that the petitioner is a "new office." The petitioner confirms that although it was incorporated in 1999 it had not commenced doing business prior to November 2001, but instead existed as a shell company. The petitioner adequately explains the lack of doing business since its incorporation and affirmatively requests consideration as a new office. The AAO finds that the petitioner is a "new office" and thus, must comply with the requirements outlined in the regulation at 8 C.F.R. § 214.2(l)(3)(v) pertaining to the opening of a new office.

The issue in this proceeding is whether within one year of approval of the petition, the beneficiary will be employed in a primarily managerial or executive capacity as required in the regulation at 8 C.F.R. § 214.2(l)(3)(v)(B).

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.

In the petition, the petitioner noted that as chief executive officer in the U.S. entity, the beneficiary would be responsible for expanding the foreign company's "reach to the U.S. by setting up [the petitioning organization] with the objective to [sic] establishing manufacturing and trade links between South East Asia and the U.S." In an attached letter, the petitioner further defined the beneficiary's proposed job duties as:

- (1) develop marketing strategy which will increase U.S. sales volume and profit in accordance with policies and guidelines set by the company;
- (2) introduce and promote a recognizable brand product;
- (3) identify new markets for penetration;
- (4) develop marketing strategy to reach both retailers and consumers;
- (5) educate wholesalers' sales teams regarding the product line;
- (6) oversee distribution and inventory control of the product in the United States; and
- (7) coordinate and administer limited product warranty program.

In a request for evidence, the director asked that the petitioner submit an organizational chart for the U.S. entity describing its managerial hierarchy and staffing levels. The director noted that the chart should identify

the beneficiary's position, the names and job titles of the beneficiary's subordinates, all executives, managers, and supervisors of the company, and the number of employees within each department. In addition, the director requested a description of the job duties, educational levels, annual salary or wages, and immigration status for all employees under the beneficiary's supervision. Finally, the director requested that the petitioner provide an explanation as to why the beneficiary is needed at the U.S. company.

In response to the director's request, counsel for the petitioner submitted a letter in which he again explained that although the petitioning organization was organized in 1999, it had not yet conducted business in the United States. Therefore, the beneficiary, who would be coming to the U.S. to open the new office, would be the only individual currently employed by the petitioner. Counsel further noted that "the initial business of the U.S. corporation is to establish a joint venture with Liquid-Air, a Utah corporation that will be marketing and selling the products manufactured by the foreign company." Counsel also claimed that the U.S. corporation expected to hire employees within the year.

In his decision, the director noted that two elements generally characterize an executive or managerial position: (1) the position involves significant authority over the generalized policy of an organization or major subdivision, and (2) substantially all of the beneficiary's duties are executed from a managerial or executive level in the organization. Basing his analysis on these two criteria, the director determined that the record did not specifically demonstrate that the beneficiary would be employed in a primarily managerial or executive capacity. Specifically, the director found that the record lacked a comprehensive description of the beneficiary's daily activities that would establish the beneficiary's authority over the generalized policy or a major subdivision of the organization. Additionally, the petitioner failed to demonstrate that the beneficiary would be functioning at a managerial or executive level in the petitioning corporation. Consequently, the director denied the petition.

On appeal, counsel claims that the job description provided by the petitioner establishes that the beneficiary will be performing managerial duties for the petitioning organization. Counsel asserts that the beneficiary "directs the management of the organization," "is charged with setting business and operational policies," has full authority over the petitioner's marketing, promotion, distribution and inventory, will plan and develop the operational policy and strategies of the petitioning organization, will have sole authority to hire and fire personnel, and has overall control of the U.S. entity. Counsel contends that the evidence establishes that the petitioner "has satisfied all four prongs of 8 C.F.R. [§] 214.2(l)(1)(ii)(C)."

Additionally, counsel refers to three cases to support a claim that the beneficiary would be functioning in a primarily managerial or executive capacity. First, counsel identifies the "two prong test" for managerial and executive capacity, also noted by the director in his decision and stated above. *See Matter of Church Scientology*, 19 I&N Dec. 593 (BIA 1988). Counsel claims that because the beneficiary will not assist in the manufacturing of the petitioner's product, nor will he provide services to the petitioner's customers, the beneficiary "qualifies for classification as an executive or manager" under the "two prong test."

Second, counsel refers to an AAO decision in which the beneficiary, although the sole employee of the petitioning company, was deemed to be a manager or executive. Counsel claims that while the beneficiary is the only employee of the petitioner, the beneficiary will possess sole control over the U.S. entity's operations, will develop the petitioner's marketing strategy, advise sales teams, and oversee the company's distribution and inventory. In light of these responsibilities, counsel contends that the beneficiary should be considered a manager or executive.

Finally, counsel asserts that the director incorrectly emphasized the lack of individuals employed by the beneficiary in determining that the beneficiary “does not manage the enterprise.” *See Mars Jewelers, Inc. v. INS*, 702 F.Supp. 1570, N.D. Ga. 1988).

On review, counsel’s assertions are not persuasive. When examining the managerial or executive 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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* In this matter, the petitioner’s description of the beneficiary’s proposed job duties fails to demonstrate how the beneficiary will be functioning in a primarily managerial or executive capacity within one year of approval of the petition. Although the petitioner outlined seven job responsibilities of the beneficiary, including developing marketing strategy in accordance with the company’s policies and guidelines, identifying new markets, and overseeing distribution and inventory, the petitioner failed to specifically indicate how these duties qualify the beneficiary a manager or executive. Specifics are 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).

Additionally, the job duties outlined by the petitioner describe the functions that should be performed by subordinate employees such as marketing, sales, or customer service personnel, and do not define the role of a manager or executive. The petitioner has essentially acknowledged that the beneficiary will be performing the non-qualifying marketing functions of the petitioning organization. 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*, *supra* at 604.

The petitioner has failed to submit any evidence that it will employ individuals within one year who will relieve the beneficiary from performing the non-qualifying duties of the U.S. entity. In its response to the director’s request for evidence, the petitioner stated only that it expects to hire employees within the year. On appeal, counsel also notes that “[a]s the company establishes itself in the United States, it is anticipated that employees will be hired to meet their needs.” The AAO recognizes that as a new company, the petitioning organization is allowed one year from the date of the approval of the petition to develop a managerial or executive position. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). However, the petitioner has failed to provide any evidence as to how it plans to develop the beneficiary’s position into one that is managerial or executive. The petitioner has not provided any information as to the number of employees the company anticipates hiring during the first year, what job duties these employees will perform, or most importantly, how the employees will relieve the beneficiary from performing non-managerial and non-executive functions of the company. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires that the petitioner submit with its petition evidence pertaining to the scope of the proposed U.S. company, its organizational structure, and its financial goals, which would establish the petitioner’s ability to support a managerial or executive position. The petitioner failed to submit any evidence of a planned organizational structure, financial goals or the scope of the entity. Rather, it simply noted that the beneficiary is the sole employee. As stated above, the petitioner is obligated to provide sufficient information regarding the nature of the U.S. entity, regardless of the fact that it

has not yet conducted any business. As there is no documentation in the file pertaining to the projected nature of the petitioning organization, it is impossible to conclude that the U.S. company will support a managerial or executive position within one year of approval of the petition.

In regards to counsel's reference on appeal to three cases involving the managerial or executive capacity of a beneficiary, counsel has failed to persuasively identify the similarities to the present case. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the three referenced cases. Rather, in regards to *Mars Jewelers, Inc.*, counsel asserts only that "the issues are almost identical." Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Moreover, unpublished decisions are not binding on CIS in its administration of the Act. *See* 8 C.F.R. § 103.3(c). Further, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising even within the same district. *See Matter of K-S*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Finally, counsel contends on appeal that the director's denial of the petition is "inappropriate" because his decision was based on an issue that the director failed to address in his request for additional evidence: the petitioner's failure to submit sufficient evidence of the beneficiary's role as a manager or executive. Counsel further claims that pursuant to 8 C.F.R. § 214.2(l)(8)(i), the director was obligated to notify the petitioner of his intent to deny the petition and the basis for the denial. As the petitioner did not receive a notice of intent to deny from the director, counsel asserts that it was not given an opportunity to rebut the director's findings.

Counsel's assertions have no merit. In the instant matter, the petitioner is granted the automatic right to appeal the decision of the director. *See* 8 C.F.R. § 103.3. Therefore, the petitioner has an opportunity in its appeal to the AAO to "rebut the director's findings" and establish eligibility. The fact that the director did not indicate in the request for additional evidence that he would later address the issue of the beneficiary's managerial or executive capacity in the denial does not preclude the petitioner from establishing eligibility for an L-1A visa. Although CIS often issues a notice requesting additional evidence prior to denying a petition, there are no statutes, regulations, or case law precedents that guarantee the petitioner that the only issues in a potential denial will be those that were previously addressed in the request for additional evidence.

Further, contrary to the claim made by counsel, the regulations do not require that the director issue a notice of intent to deny prior to denying the petition. The regulation at 8 C.F.R. § 103.2(b)(16)(i) indicates that the petitioner shall be provided an opportunity to rebut an adverse decision if the director's decision is based on *derogatory information of which the petitioner is unaware*. *See also*, 8 C.F.R. § 214.2(l)(8)(i) (when an adverse decision is based on evidence not in the record, the director shall notify the petitioner of his intent to deny, and the petitioner shall be granted an opportunity to rebut the evidence). If the director's adverse decision is based on evidence submitted by the petitioner with the petition, the director is not required by regulation to issue a notice of intent to deny. *Id.*

Consequently, it is concluded that the petitioner has failed to establish that the beneficiary will be employed as a manager or executive within one year of approval of the petition. Therefore, the petition cannot be approved.

Beyond the decision of the director, the record as presently constituted is not persuasive in demonstrating that a qualifying relationship exists between the U.S. and foreign entities. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(1), a qualifying relationship is formed if the foreign and U.S. companies possess one of the following relationships, as each is defined in the regulations: parent, branch, affiliate or subsidiary. 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 the United States and foreign entities. *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. *Matter of Church of Scientology International*, *id.*

In the present matter, the petitioner submitted a copy of a stock certificate in which the foreign company is identified as a registered holder of 5,000 shares of the U.S. entity's 10,000 authorized shares of common stock. The evidence in the record does not indicate the price per share of the stock. The director subsequently requested that the petitioner submit evidence that the foreign company provided consideration for the stock, including wire transfers from the parent company, cancelled checks, bank statements, and the stock ledger. In response to the request, the petitioner noted that the foreign company "earmarked \$3 million in manufactured product inventory, 1200 units of which were utilized for the partial payment of 5,000 shares of common stock issued on or about February 1999." The petitioner further claimed that "[I]n addition to inventory, \$20,000 in cash was deposited for the partial payment of the 5,000 shares of common stock."

The petitioner's assertions as to ownership of the stock are not supported by evidence in the record. The petitioner submitted two wire transfer memos, which indicate a total deposit of \$10,000 in the U.S. company's account. Additionally, the stock ledger submitted by the petitioner reflects that the foreign company received 5,000 shares of common stock, yet failed to indicate how much money or property the foreign company gave as consideration for the stock. Furthermore, although the foreign company asserted that it transferred property in exchange for stock in the U.S. company, the few shipment forms in the record fail to adequately document the claimed transfer. 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, 591-92 (BIA 1988). As the petition will be dismissed on other grounds, this issue need not be further addressed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests 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.