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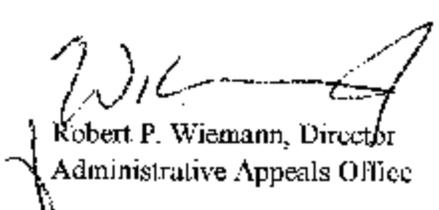
IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(I) 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 company established in the State of California. It is engaged in the import, export and sale of musical instruments in the United States. The petitioner currently employs the beneficiary as its "vice general manager," and seeks to extend the beneficiary's employment for three additional years. The petitioner filed a petition requesting the beneficiary be granted an extension of her L-1A status.

The director denied the petition concluding that the petitioner had failed to demonstrate: (1) that a qualifying relationship exists between the foreign and United States companies; and, (2) that the beneficiary has been and will be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner asserts in a separate brief that the petition was erroneously denied. Counsel submits new evidence, including a revised corporate tax form and copies of checks paid for commissions, as evidence that a qualifying relationship exists, and that the beneficiary is a manager or executive.

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) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (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.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii), a visa petition involving the opening of a new office may be extended by filing a new Form I-129 and submitting the following evidence:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the petitioner has established that the foreign and United States companies are qualifying organizations.

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms as follows:

(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 (l)(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 operating 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.

(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.

In the present matter, the petitioner identified on the petition and in an appended letter that the United States organization is a subsidiary of the foreign company. It was noted in the U.S. company's Articles of Incorporation that the corporation was authorized to issue 100,000 shares of stock. The petitioner also submitted a copy of a stock certificate, in which the foreign company was named as the register holder of 100,000 shares of stock in the U.S. company, and a stock transfer ledger, which reflected an issuance of 100,000 shares of stock to the foreign company in the amount of \$100,000. Additionally, the petitioner provided copies of the U.S. corporation's year 2000 U.S. Corporation Tax return, Depreciation and Amortization Schedule, Information Return of a 25% Foreign-Owned U.S. Corporation, and the California Corporation, Franchise or Income Tax return.

In a Notice of Intent to Deny issued by the director on August 24, 2001, the director identified several inconsistencies in the record that supported a finding that the two companies were not qualifying organizations. First, the director noted that in Schedule K of the petitioner's federal tax return, the petitioner indicated that it was not a subsidiary in an affiliated group or parent-subsidiary controlled group. Yet, in the attached Tax Form 5472, the petitioner noted that the foreign company was a 25% shareholder of the U.S. entity. In addition, on the California corporate income tax return, the petitioner did not answer questions in the affirmative that addressed whether 50% or more of its voting stock was owned by any single interest; whether the petitioner owned 50% or more of another corporation; or, whether 50% or more of the voting stock of the petitioning organization and one or more other corporations was owned or controlled by the same interest.

Moreover, the director noted that absent additional explanation and documentation, including copies of wire transfers or bank statements, the petitioner had not conclusively established a qualifying relationship. The director requested that the petitioner submit additional documentation to substantiate the claim that the foreign and U.S. companies are qualifying organizations.

In response, the petitioner acknowledged that the corporate tax forms failed to identify that the U.S. company was a subsidiary of the foreign corporation, and noted that the company's accountant had made a mistake in preparing the forms. The petitioner submitted a letter from the accountant in which the accountant stated that the petitioning company was fully owned by the foreign company. The accountant further noted that the following mistakes had been made on the tax forms: (1) that Schedule K of the federal corporate tax return should identify the petitioner as a subsidiary in an affiliated group or in a parent-subsidiary controlled group; (2) that Schedule J, Section K of the California income tax return should reflect that during the taxable year, more than 50% of the petitioner's voting stock was owned by a single interest, that more than 50% of the voting stock of another corporation was owned by the petitioning organization, and that 50% of the voting stock of the petitioner and one or more other corporations was owned by the same interest; and, (3) that Schedule J Section Y of this same tax return should be answered in the affirmative.

Additionally, in regards to the director's statement that the record lacked evidence of monetary transfers made by the foreign company to the U.S. company, the petitioner submitted the following evidence: (1) a copy of a company board resolution from the foreign company; (2) a letter from a U.S. customer verifying the transfer of money into the U.S. company's account as prepayment for musical instruments; and, (3) a copy of a bank cable which reflects a credit of \$100,000 to the petitioning organization's checking account from the U.S. customer. The petitioner asserted that these documents were submitted with the initial petition, but that they were overlooked by the director. In the board resolution, the five board members agreed that "in order to

establish [the U.S. company] and to develop business as soon as possible," the foreign company would transfer \$100,000 to the petitioning organization. The foreign company indicated that \$100,000 "that was recently received from [a third party] as prepayment to [the petitioner]" be transferred as initial capital. The petitioner indicated in its response to the director that these documents confirmed that the foreign company funded the U.S. company with initial capital, and therefore established a qualifying relationship between the two companies.

In her decision, the director determined that, as a result of the inconsistencies in the petitioner's tax forms, the petitioner failed to demonstrate that the foreign and U.S. companies have a qualifying relationship. The director noted that the letter from the petitioner's accountant, in which the accountant admitted to making various errors in the petitioner's tax forms, was insufficient to resolve the discrepancies. The director further noted that the petitioner had failed to provide evidence that it had filed amended tax returns with the Internal Revenue Service.

In addition, the director acknowledged that the wire transfer and board resolution had been overlooked. However, the director concluded that these documents, specifically, the letter indicating prepayment for merchandise and the copy of the wire transfer, merely confirmed that a U.S. customer ordered and prepaid for musical instruments from the petitioner. The director also determined that the board resolution in which the foreign company's board members exhibited an intent to transfer \$100,000 to the petitioner's account failed to demonstrate that the foreign organization actually transferred the funds. Therefore, the director found that the petitioner had failed to establish a qualifying relationship with the foreign company.

On appeal, the petitioner submits a copy of its revised tax returns in response to the director's finding that the record lacked evidence as to the tax forms being corrected. In addition, counsel asserts that the director "used [her] own oversight [of the wire transfer] as a reason for casting doubt on the validity of the [petitioner's] statements and documents." Such documentation, counsel claims, established the legal ownership of the petitioning company by the foreign organization.

The AAO will adjudicate this issue based on the evidence available to the director at the time of her review. It is an established rule that the AAO does not consider new evidence on appeal where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by CIS. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In this matter, the petitioner was informed by the director in a Notice of Intent to Deny that additional documentation was necessary to determine whether the U.S. and foreign companies were qualifying organizations. The petitioner failed to provide its revised tax returns, which it subsequently submitted on appeal. As this evidence was previously available to the petitioner, it will not be considered on appeal. *Id.*

On review, the record does not sufficiently establish that a qualifying relationship exists between the U.S. and foreign companies.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the United States and foreign entities are ownership and control. *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 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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* at 595.

In an attempt to establish ownership and control of the petitioning organization, the petitioner submitted a resolution adopted at the foreign company's board meeting. In the resolution, the five board members decided that the foreign company would transfer \$100,000 to the petitioning organization "in order to establish . . . and to develop business as soon as possible." The money was designated by the Board as "initial capital."

In support of the parent/subsidiary relationship, the petitioner also submitted a stock certificate, which identified the foreign company as owner of 100,000 shares of the petitioning organization, a stock transfer ledger, and a certificate transfer form. While these documents assist in the analysis of a qualifying relationship, they are insufficient in establishing such. The petitioner is essentially claiming that the foreign company's resolution to transfer \$100,000 to the petitioning organization establishes that it funded the U.S. company, and likewise, has ownership and control of the company. However, there are two discrepancies that undermine this claim.

First, the petitioner has failed to provide sufficient evidence that the foreign company actually transferred the funds to the U.S. entity. The resolution submitted by the petitioner demonstrates only an intent to transfer the money. The petitioner provided a copy of a funds transfer receipt identifying the U.S. company as the recipient of \$100,000. Yet a notation on the transfer form indicates that the funds were from a U.S. customer, not the foreign company. The petitioner has not provided sufficient evidence to link the prepayment of \$100,000 from the petitioner's U.S. customer to the petitioner's claimed parent company. 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).

An additional inconsistency exists in the amounts reported on the petitioner's stock transfer ledger and its year 2000 U.S. Corporation Income Tax return. The petitioner's stock ledger contains information that on May 22, 2000, the foreign company paid the U.S. corporation \$100,000 in return for the issuance of 100,000 shares in the U.S. company. However, on Schedule L of the corporation's year 2000 tax return, the petitioner reported common stock in the amount of \$110,960.00. The petitioner has failed to provide evidence explaining the disparity in these amounts. Again, 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, supra*.

The petitioner has failed to establish that the foreign company has both ownership and control of the U.S. entity. The foreign company has only provided evidence of an intent to fund the U.S. company. Absent concrete documentation verifying the transfer of funds by the foreign company in exchange for ownership of the U.S. corporation's stock, the AAO cannot find that a qualifying relationship exists between the two entities.

Moreover, the petitioner has not adequately explained the discrepancies in the U.S. entity's tax returns. The petitioner's accountant submitted a letter acknowledging mistakes on the tax return. In particular, she noted that Section K of Schedule J of the California income tax return should reflect that the petitioner is the owner

of more than 50% of the voting stock of another corporation. The record, however, contains no evidence of the petitioner owning stock in another company. While this does not contribute to the analysis of a qualifying relationship between the foreign and U.S. companies, it creates doubt that the other inconsistencies in the tax returns were changed correctly. Further, as addressed by the director, the accountant's written acknowledgement of mistakes in the tax returns does not sufficiently resolve the discrepancies. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra*. Therefore, the director was correct in her determination that the foreign and U.S. corporations are not qualifying organizations.

The remaining issue in this proceeding is whether the beneficiary has been or will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter submitted with the petition, the petitioner identified the following job duties of the beneficiary as "vice general manager":

- General responsibility for the overall operations of the company;
- Specific authority to bind the company to contracts;
- Formulate necessary policies and see they are implemented;
- Build the company's customer base;
- Hire and fire personnel as needed;
- Coordinate activities between the parent company and its US subsidiary;
- Report to the board of directors of [the foreign company].

In an attached U.S. organizational chart, the petitioner outlined the beneficiary's additional responsibilities as: plan, direct, and manage the overall operation of the company; develop corporate policies with the board of directors; oversee different aspects of the company's operations; and, supervise and assign work among departments, and the parent and U.S. corporations. Also reflected on the organizational chart was the beneficiary's position as president, and four subordinates who were identified as managers of the sales and marketing department, accounting department, administration department, and transportation department. There was no indication that the company employed any individuals in these departments. Further, the Quarterly Wage and Withholding Report for the period ending on March 31, 2001 identified five employees of the corporation: the beneficiary and four managers.

The director notified the petitioner of his intent to deny the petition on August 24, 2001. The director indicated that the petitioner had failed to establish that the beneficiary had been or would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner's organizational hierarchy did not appear to support a manager or executive. Furthermore, the director determined that the evidence did not persuasively establish that the beneficiary would be managing a subordinate staff of professional, managerial, or supervisory personnel who would relieve her from performing non-qualifying duties. The petitioner was allowed additional time to submit evidence to support the petitioner's claim that the beneficiary would function as a manager or executive.

Counsel for the petitioner submitted a letter in response to the director's Notice of Intent to Deny asserting that the criteria for establishing managerial or executive capacity are: (1) that the beneficiary has the requisite knowledge; (2) that the majority of the beneficiary's duties relate to operational or policy management; and, (3) that the beneficiary does not supervise lower level employees. Counsel contended that these requirements have been met. Counsel further claimed that the focus of the analysis should be on the functions performed by the beneficiary and the petitioner's reasonable needs and stage of development.

Petitioner's counsel also asserted that the managers subordinate to the beneficiary are professionals as each possesses a bachelor's degree. In addition, counsel noted that the accounting and sales and marketing managers "[supervise] outside help such as reps," thereby demonstrating the managerial nature of each position. As a result, counsel asserted that the beneficiary should be considered a manager or executive.

In her decision, the director determined that the beneficiary was not functioning in the United States as a manager or executive. The director acknowledged counsel's claim that the present analysis should be on the functions of the beneficiary, rather than the petitioner's staffing levels. However, as noted by the director, the petitioner must clearly demonstrate that the beneficiary is not directly performing the function.

The director concluded that the petitioner did not employ any individuals who would perform the petitioner's non-managerial duties. The director further stated that although the petitioner's counsel claimed that two employees subordinate to the beneficiary managed sales representatives, the petitioner had not submitted any evidence of personnel records or commissions paid to these individuals. Consequently, the director determined that the petitioner had not established that the beneficiary had been or would be performing in a primarily managerial or executive position for the petitioning organization.

On appeal, counsel for the petitioner submits a statement in support of the petitioner's assertions that the beneficiary is performing primarily managerial and executive functions in the U.S. company. While the majority of counsel's letter is actually a restatement of the director's decision, counsel does assert that "the beneficiary has not been and will not be performing the day-to-day duties involved in the sale of musical instruments." Counsel also provides copies of checks, which counsel claims are evidence of commissions paid to two sales representatives.

On review, the record does not establish that the beneficiary has been or will be employed in the petitioning organization in a primarily managerial or executive capacity.

As previously explained, the AAO will adjudicate this issue based on the evidence available to the director at the time of her review. See *Matter of Soriano, supra*, (new evidence submitted on appeal will not be considered where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated). In this matter, the petitioner was notified by the director in a Notice of Intent to Deny that there was insufficient evidence of additional employees subordinate to the department managers. The petitioner failed to provide copies of the commission checks paid to the sales representatives, which it subsequently submits on appeal. As this evidence was previously available to the petitioner, it will not be considered on appeal. *Id.*

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 the present matter, the petitioner's description of the beneficiary's job duties fails to sufficiently establish her role as a manager or executive in the U.S. company. The job responsibilities identified by the petitioner, such as "formulate necessary policies," "hire and fire personnel," and "[exercise] responsibility," essentially restate portions of the regulations, and offer no explanation as to how the beneficiary will perform in a primarily managerial or executive role. See Section 101(a)(44)(A)(ii) and (iv); Section 101(a)(44)(B)(ii). 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).

There is also insufficient evidence to demonstrate that the beneficiary manages employees who relieve her from performing the actual functions of importing, exporting, and selling musical instruments. Counsel contends that as president, the beneficiary supervises four department managers who are professionals.

Counsel's assertion is not persuasive for two reasons. First, counsel and the petitioner fail to provide any evidence that the subordinates of the beneficiary are actually performing as managers in the petitioning organization. As correctly determined by the director, there is no documentation establishing that the petitioner employs lower-level employees who are managed by the beneficiary's subordinates. Simply giving an employee the title of manager is not enough to establish that an employee is performing as such. Again, 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, supra*.

In addition, counsel contends that the managers subordinate to the beneficiary are professionals as each possesses a bachelor's degree. Again, counsel's assertion is not persuasive. The term "profession" is defined in section 101(a)(32) of the Act and includes, but is not limited to architects, engineers, lawyers, physicians, surgeons, and teachers of elementary or secondary schools, colleges, academies, or seminaries. Additionally, as provided in 8 C.F.R. §204.5(k)(2), the term "profession" includes not only one of the occupations listed in section 101(a)(32) of the Act, but also any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation. Neither the petitioner nor counsel has submitted any evidence that a baccalaureate degree or its foreign equivalent is necessary for an individual to perform in the positions held by the beneficiary's subordinates. More importantly, there is no evidence in the record that the subordinates even possess bachelor degrees. Counsel simply asserts such in his response, but fails to submit transcripts or diplomas for each employee. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Again, 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, supra*.

The petitioner and counsel have failed to establish that the beneficiary will be performing primarily managerial or executive functions. There is insufficient evidence to conclude that the beneficiary will be performing primarily managerial or executive duties rather than performing the functions associated with the petitioner's sale of musical instruments. The record does not substantiate that the beneficiary is actually managing or directing professional, supervisory, or managerial employees. The record demonstrates only that the beneficiary is acting as a first-line supervisor, and performing non-qualifying duties. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Matter of Church Scientology International, supra* at 604. Further, 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. *Id.*

The petitioner has failed to establish that the beneficiary has been or will be performing in a primarily managerial or executive capacity as required by the regulation at 8 C.F.R. § 214.2(f)(3)(ii).

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.