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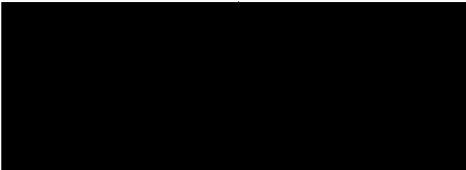
FILE: LIN 02 093 53552 Office: NEBRASKA SERVICE CENTER Date:

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 nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, C.C. Trixco, Inc., claims that it is a subsidiary and an affiliate of Lite Power Associates located in China. The petitioner is engaged in the restaurant business. The U.S. entity was incorporated in the State of Colorado on January 1, 1996 and claims to have ten employees. Accordingly, in January 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 three years. The petitioner seeks to employ the beneficiary as the U.S. entity's C.E.O. and general manager at an annual salary of \$40,000.

On July 2, 2002, the director denied the petition. The director determined that the beneficiary will not be employed in a primarily executive or managerial capacity.

On appeal, the petitioner's counsel claims that the director misunderstood the nature of the proposed position and states, "the beneficiary's tasks clearly evidence her Executive Capacity within the company and fall within the statutory definition. . . ." Counsel submits a brief, but no new evidence, in support of the appeal.

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.

The regulations at 8 C.F.R. § 214.2(l)(14)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (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 issue in this proceeding is whether the beneficiary will be employed 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.

On January 24, 2002, the petitioner submitted a letter signed by the beneficiary in support of the Form I-129. The January 18, 2002 letter described the beneficiary’s proposed U.S. duties:

- i. Confer with staff to plan business objectives, to develop organizational policies to coordinate functions and operations between management, front of the house, and back of the house operations;
- ii. Review activity reports and financial statements to determine progress and status in attaining objectives based on current and future market conditions;
- iii. Direct and coordinate the operation to provide funding for new or continuing operations to maximize returns on investments, and to increase productivity;
- iv. Plan and develop restaurant, employee, and public relations policies designed to improve the company's image and relationships with customers; and
- v. Evaluate [the] performance of managers and staff with respect to conformance with established policies and business objectives.

In addition, the beneficiary stated that she will supervise all employees, and will perform both executive and managerial duties. Therefore, the petitioner must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. *See* sections 101(a)(44)(A) and (B) of the Act.

The petitioner indicated on Form I-129 that it has ten employees and submitted an organizational chart depicting the beneficiary as owner/general manager, Landom, Inc., a management company, a general manager, restaurant operations, a general manager, a restaurant manager, dining room supervisors, hostess/cashier, wait staff, bussers, a kitchen supervisor, cooks, utility personnel, a banquet captain and banquet servers. An attached chart indicates that the petitioner employs three waitresses, one hostess, three cooks, one banquet waiter and two food and beverage management personnel. The petitioner also submitted a payroll register for a pay period ended on October 27, 2001 showing ten hourly employees receiving wages between \$2.13 and \$11.00 per hour.

On July 2, 2002, the director denied the petition concluding the beneficiary will not be employed in a primarily executive capacity. The director stated that the evidence did not indicate whether the management company, the franchise organization, or the beneficiary will direct the organization. The director also stated that he assumed the beneficiary will be acting as the general manager, general manager of restaurant operations, and restaurant manager since the record did not establish that these positions were filled at the time of filing. The director found that the beneficiary would be primarily acting as a first-line supervisor of non-professional personnel.

On appeal, counsel claims that the licensing agreement with Country Kitchen requires a manager responsible for supervising the employees to be on duty. Counsel also claims that the beneficiary will supervise the restaurant manager and the general manager of the restaurant operations. Counsel's July 31, 2001 brief described the beneficiary's proposed U.S entity's duties as:

- Develops business and organizational objectives
- Analyzes financial reports
- Directs operations to ensure continuing profits
- Evaluates the staff in relation to established policies and business objectives.
- Reviews all subordinate employees' performances
- Directs the management of the organization
- Establishes the goals and policies of the restaurant
- Exercises wide latitude in decision making, and receiving only general supervision from the franchiser.

In examining the executive or 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(I)(3)(ii). On review, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity. The petitioner describes the beneficiary's duties as planning and developing the restaurant operation and public relations, evaluating the performances of managers and the staff, and developing business and organizational policies. However, the beneficiary's described duties are broad and do not elaborate how the beneficiary will develop the business or what policies the beneficiary will plan. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as establishing the goals and policies of the company and exercising wide latitude in decision making. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as being involved in marketing by planning public relations policies to improve the company's image and relationships with customers. Since the beneficiary will plan and develop public relations policies, she is performing tasks necessary to

provide a service or product. Marketing duties, by definition, are tasks necessary to provide a service or produce a product. 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).

Moreover, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel. Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's duties will involve managing employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The beneficiary stated: "I supervise all of the employees, including the restaurant managers and employees." However, the organizational chart shows no indication that the subordinate employees will be supervisory or managerial. The U.S. entity's organizational chart fails to identify the names of the employees and does not provide a description of their duties. Also, the U.S. entity's organizational chart appears to depict significantly more than ten employees while the Form I-129 and payroll statement indicate that there are ten subordinate employees. However, based on a review of the petitioner's payroll statement the positions of general manager of restaurant operations and restaurant manager do not appear to be filled. Since these positions are not filled, this indicates that the beneficiary will be supervising only ten employees, including cooks, wait staff, a hostess, and one to two employees identified as "food and beverage management."

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. 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 Shin*, 11 I&N Dec. 686 (D.D. 1966). The beneficiary's subordinates are not professionals as the restaurant employees are not typically positions requiring a baccalaureate degree. The description of the beneficiary's job duties lead the AAO to conclude that the beneficiary will be performing as a first-line supervisor of non-professional employees, rather than as a manager or executive. 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)(A)(iv) of the Act. 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*, 19 I&N Dec. 593, 604 (Comm. 1988).

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Although not explicitly addressed by the director, the AAO finds that the petitioner does not have a qualifying relationship with the foreign organization as required by 8 C.F.R. § 214.2(l)(ii). The

pertinent regulations at 8 C.F.R. § 214.2(l)(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 (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 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.

(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 addition, the regulations and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and foreign entity. *See Matter of Church Scientology International, supra*; *See also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context

of this visa proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

In order to establish the petitioner and foreign entity have a qualifying relationship, the petitioner initially submitted the U.S. entity's stock certificate, the foreign entity's stock certificates, a statement from the beneficiary, Forms 1120, U.S. Corporation Income Tax Return, for 1997 through 2000, and a 2001 Annual Return for the foreign entity. The petitioner indicated on Form I-129 that the beneficiary owns 100 percent of the U.S. company and 45 percent of the foreign company and controls both companies.

On March 21, 2002, the director requested additional evidence. In particular, the director requested annual reports, statements from the organization's president or corporate secretary, articles of incorporation, financial statements, and evidence of the ownership of all outstanding stocks for both entities. The director stated that in order to qualify as a subsidiary, the petitioner must show that the beneficiary has control of the foreign entity. The director stated that the documents submitted indicated that the beneficiary owns 90,000 shares, [REDACTED] owns 90,000 shares, and [REDACTED] owns 20,000 shares of the foreign entity. Therefore, the beneficiary owns 45 percent of the foreign entity. The director also determined that the petitioner and foreign entity "do not qualify as affiliates since the two entities are owned by different groups of differing proportions."

In response to the request for additional evidence, the petitioner's counsel submitted an April 12, 2002 brief asserting:

- The beneficiary controls the U.S. entity and owns 100 percent of the company
- The U.S. entity is a subsidiary because the beneficiary "owns directly . . . more than half the entity and controls the entity." 8 C.F.R. § 214.2(l)(ii)(K)
- The beneficiary and her husband own 55 percent, with respective interests of 45 percent and 10 percent; therefore, the foreign entity is a subsidiary because the beneficiary owns less than half, but in fact controls the entity
- The beneficiary controls the entity as indicated by a statement of the beneficiary claiming she is the director of the board, a 2000 annual report documenting the beneficiary as the director of the board, and an organizational chart certifying the beneficiary is the managing director and president of the foreign entity.
- The annual reports, statements from the organization's president or corporate secretary, articles of incorporation, financial statements, and evidence of ownership of all outstanding stock for both entities establish that the beneficiary owns less than half of the entity but in fact controls the foreign entity.

- The organizations qualify as affiliates and subsidiaries because the entities are owned and controlled by the same individual
- The beneficiary has “now acquired 51% ownership” of the foreign entity evidencing that the beneficiary controls the entity
- The beneficiary “acquired this additional ownership interest in furtherance of her desire of an L-1A approval.”

The petitioner submitted an instrument of transfer indicating that Tse Tung Nin transferred 12,000 shares of the foreign entity’s stock to the beneficiary on March 22, 2002, and also provided a copy of the new stock certificate and stock ledger as evidence of the transaction.

On July 2, 2002, the director stated: “The petitioning entity submitted additional evidence indicating a material change in the ownership after the petition had been received by this Service in an attempt to make the petition approvable. This is unacceptable”

On appeal, counsel did not refute the director’s findings.

On review, the evidence the petitioner submitted is not sufficient to establish 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). The petitioner asserted that the U.S. entity is a subsidiary and affiliate of the foreign entity because they are owned and controlled by the same individual. See 8 C.F.R. §§ 214.2(l)(1)(ii)(I) and (K). At the time the petition was filed, the beneficiary owned 45 percent of the foreign entity and 100 percent of the U.S. entity. Counsel claims that because the beneficiary owns 100 percent of the U.S. entity and 45 percent of the foreign entity that there is a qualifying affiliate relationship based on common ownership and control by one individual.

CIS does recognize that if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Here, no one shareholder held a majority interest in the foreign entity at the time of filing. The record, therefore, fails to demonstrate that there is a high percentage of common ownership and common management between the two companies. Counsel attempted to establish that the beneficiary in fact controls the foreign entity because her spouse also owned ten percent of the company’s shares, suggesting that together, they had a majority interest. In order to establish “de facto” control of both entities by an individual, the petitioner must provide agreements relating to the control of a majority of the shares’ voting rights through proxy agreements. *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982). A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. See *Black’s Law Dictionary* 1241 (7th Ed. 1999). Absent evidence of such an agreement between the beneficiary and her spouse, the AAO cannot find that the beneficiary controlled the foreign entity.

As noted by the director, the petitioner submitted additional documentation in response to the request for evidence indicating a material change in the ownership after the petition had been received in an attempt to make the petition approvable. The petitioner submitted a document

indicating that in March 2002, the beneficiary acquired additional shares of the foreign entity. The petitioner also stated, in response to the request for evidence, that the beneficiary "acquired this additional ownership interest in furtherance of her desire of an L-1A approval." However, the petitioner must establish eligibility at the time of filing. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Accordingly, the petitioner has not established that there was a qualifying relationship between the U.S. and foreign entities as of January 24, 2002 when the petition was filed. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the AAO finds insufficient evidence to establish that the beneficiary has been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), 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. *Id.* The petitioner stated that the beneficiary has been working in an executive capacity abroad since 1994. In addition, in a supporting letter filed with Form I-129, the beneficiary stated that she directs the affairs of the foreign entity on a daily basis, supervises eight to ten employees, and determines the policies of the company. The foreign company's organizational chart depicts only a merchandiser, a shipping clerk, a quality controller, and an accounts employee under the beneficiary's supervision. In addition, the petitioner submitted only a limited and vague description of the beneficiary's foreign duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In sum, the AAO is not persuaded that the beneficiary has been employed in a primarily managerial or executive capacity abroad. As this appeal will be dismissed on other grounds, this issue will not be examined any further.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

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.