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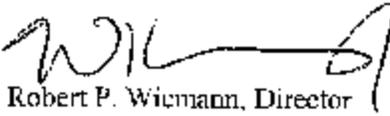
IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, NMC Enterprises, Inc., states that it is the parent and 100 percent owner of a Chinese business, Rimports Electronics Technology Co., Ltd. The petitioner describes itself as a distributor of broadband communication equipment in China. The U.S. entity is incorporated in the State of Texas. In June 1999, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (I-1A).¹ CIS approved the petition as valid from June 15, 1999 to June 15, 2001. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for two years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's vice president for operations and business development in the People's Republic of China at an annual salary of \$60,000.

On February 16, 2002, the director determined that the beneficiary did not qualify as a manager or an executive. Additionally, the director concluded that the petitioner had failed to establish a qualifying relationship between the U.S. and Chinese entities. Consequently, the director denied the petition.

On appeal, petitioner's counsel asserts that the beneficiary serves in a primarily managerial or executive capacity and that a qualifying relationship exists between the U.S. and Chinese entities.

To establish I-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.

In relevant part, the regulations at 8 C.F.R. § 214.2(f)(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 (f)(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.

Initially, the AAO will address the issue of whether the beneficiary's proposed duties for the United States entity will be executive and managerial. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

¹ Counsel submitted an April 3, 2001 letter indicating that that, previously, CIS had incorrectly identified the beneficiary as Ma Wci Xian. Counsel's April 3 letter states that the beneficiary's correct name is Wei Xian Ma.

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.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(f)(3)(i). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Counsel's brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

In this instance, the petitioner provided four essentially similar descriptions of the beneficiary's proposed duties in the United States. These descriptions appear on Form I-129, in an April 2, 2001 letter attached to the Form I-129, in a November 13, 2001 letter submitted in response to the director's August 16, 2001 request for evidence, and in counsel's brief on appeal. The April 2, 2001 letter provides a representative summary of the proposed duties:

- Directing the management of the petitioner's U.S. office as well the petitioner's office in Beijing and the petitioner's wholly-owned subsidiary in China;
- Directing the management of the petitioner's business development, sales and marketing and all strategic planning in its U.S. and Chinese offices;
- Establishing the strategic goals and policies of the petitioner's offices in the United States and China;
- Establishing and implementing operating policies and procedures of the petitioner's offices in the United States and China;
- Receiving only general supervision or direction from the petitioner's president with regard to directing the management of the petitioner's United States and Chinese offices;
- Managing the operational performance of the petitioner's activities in the United States and China, which is an essential function within the petitioner;
- Supervising and controlling the work of 20 employees, of whom 15 are professional degree employees, and recommending whether they should be hired, terminated, promoted or granted leaves of absence;
- Exercising wide latitude in discretionary decision-making and authority over the day-to-day operations associated with directing the management of the petitioner in the United States and China;
- Managing and establishing United States and overseas entities' goals;
- Supervising the petitioner's exports, sales, distribution, marketing, product development, technical assistance and accounting functions;
- Pursuing new business developments opportunities for the petitioner in the United States and China;
- Maintaining the petitioner's working relationships with U.S. companies and providing updated information on market and product developments, pricing, marketing and trading issues in China;
- Coordinating the importation of the broadband communication equipment from the United States into China and ensuring that the petitioner's importations are in compliance with international import and export laws and regulations;
- Analyzing and evaluating new U.S. technology for sale and application in China; and

- Training the petitioner's employees in the United States on new policies, procedures, and strategies for selling the petitioner's products in China, and on servicing the market in China.

(Bullets added.) The petitioner included an organizational chart of the U.S. entity in addition to the job descriptions. The chart depicts Chris Churchill as president, the beneficiary as vice president, and Anne Gambino as export manager. Chris Churchill supervises the beneficiary who, in turn, supervises Anne Gambino.

In response to the director's August 16, 2001 request for evidence, the petitioner submitted California State DE-6 wage reports for the last quarter of 2000 and the first three quarters of 2001. All but the third quarter of 2001 listed the petitioner as employing Chris Churchill, the beneficiary, and Anne Gambino. The third quarter of 2001 listed only Chris Churchill and the beneficiary as employees. Additionally, the petitioner submitted Year 2000 W-2 forms for Chris Churchill, the beneficiary president, and Anne Gambino.

As described in the letters, the beneficiary's proposed duties primarily comprise marketing tasks. For example, the beneficiary will be "directing . . . business development, sales and marketing," "pursuing new business development opportunities," "maintaining working relationships with U.S. companies," and "analyzing and evaluating new U.S. technology for sale and application in China." Similarly, the beneficiary's proposed responsibilities will include "supervising . . . exports, sales, distribution, marketing, product development, technical assistance, and accounting functions" as well as "training . . . employees in the U.S. on new policies, procedures, and strategies for selling . . . products in China, and on servicing the market in China."

Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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). These duties listed above establish, therefore, that the beneficiary will not be performing primarily managerial or executive duties.

Additionally, the claimed duties are too broad and nonspecific to convey an understanding of the beneficiary's daily activities. For instance, the petitioner characterized the beneficiary's potential tasks as "directing the management of the . . . U.S. office," "establishing and implementing operating policies and procedures," "managing and establishing [the U.S. and overseas entities'] goals," "coordinating the importation of . . . equipment from the U.S. into China," and "analyzing and evaluating new U.S. technology." The petitioner provided no quantifiable definitions for "directing," "establishing," "implementing," "coordinating," "analyzing," and "evaluating." Similarly, the petitioner did not define "policies," "procedures," or "goals."

The AAO further notes that the petitioner generally paraphrased the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. The petitioner, for example, described the beneficiary as "receiving only general supervision or direction," "exercising wide latitude in discretionary decision-making and authority over the day-to-day operations," and "recommending whether [employees] should be hired, terminated, promoted, or granted leaves of absences."

Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. IWS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see

generally Republic of Transkei v. INS, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the record lacks adequate supporting documentary evidence to define the beneficiary's duties as primarily executive or managerial.

Finally, although the petitioner claims that the beneficiary manages the staff of the Chinese subsidiary, the petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academics, 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 petitioner claims that the beneficiary will be "supervising and controlling the work of 20 employees, of [whom] 15 are professional degreed employees." The record indicates that these 20 employees work for the claimed Chinese subsidiary. The relevant issue, however, is how many employees the beneficiary will supervise while working for the petitioner. The organizational chart, DE-6 wage reports, and W-2 forms demonstrate that, at most, three employees work for the petitioner. Moreover, the organizational chart reveals that Anne Gambino is only the employee whom the beneficiary supervises. The record contains no evidence demonstrating that Anne Gambino has the requisite education or is able to relieve the beneficiary of his nonqualifying duties. Consequently, the staff whom the beneficiary oversees fails to qualify as managerial.

In sum, the beneficiary's marketing duties, vaguely defined responsibilities, and supervision of a non-professional, non-managerial staff preclude CIS from classifying the beneficiary as a manager or executive.

The AAO now turns to the question of whether the United States entity has established a qualifying relationship with the Chinese entity. The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (f)(1)(i) 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)(U) 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.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (Comm. 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra*.

The AAO acknowledges that the director did not explicitly articulate her reasons for finding that the petitioner failed to demonstrate the existence of a qualifying relationship. The AAO, nonetheless, agrees with the director's conclusion. Specifically, the record not only presents conflicting evidence but insufficient documentation on the qualifying relationship question. *Matter of Ho, supra*; *Matter of Treasure Craft of California, supra*. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). Furthermore, as established earlier, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

Examples of the inconsistent evidence and undocumented assertions include:

- The translated Year 2000 auditor's report of the Chinese entity indicates that "NMC Co., Ltd." paid 100 percent of the capital investment in Rimports Electronics Technology Co., Ltd. The petitioner's name,

however, is NMC Enterprises, Inc. The AAO notes that, given the differing names, the two entities may be different companies. The petitioner did not explain this inconsistency.

- A certificate of approval for establishment of enterprises with foreign investment in the People's Republic of China refers to the foreign investor as "NMC Enterprises Inc." A partial translation appears on the document itself; however, however, the petitioner did not identify who rendered the translation. Without this identification the translation cannot establish a qualifying relationship. See 8 C.F.R. § 103.2(b)(3).
- The articles of incorporation for Rimports Electronics Technology Co., Ltd., are only partially translated. Although the first page of the document has been translated, the remainder of the articles of incorporation are untranslated. The untranslated sections may contain investor information. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. *Matter of Siemens, supra*.
- The petitioner's Year 2000 U.S. Corporation Income Tax Return Form 1120 and its supporting schedules and forms present conflicting information. Supporting Statement 5 to Schedule K and supporting Statement 11 to Form 5471 state that a United States company named Rimports, Inc., owns 100 percent of the petitioner's stock. Supporting Statement 11 to Form 5471 further states that the beneficiary owns 35 percent of Rimports, Inc. Additionally, Form 5471 and a corporate organizational chart submitted in connection with Form I-129 depict the petitioner as owning 100 percent of the stock in Rimports Electronics Technologies Co. (Beijing) Ltd. The record, however, lacks evidence to verify these stock ownership assertions.
- On appeal, as well as on the Form I-129 and in response to the request for evidence, counsel asserts that the petitioner owns a 100 percent interest in the Chinese entity, Rimports Electronics Technology Co., Ltd.; thus, counsel claims that the Chinese company is a wholly-owned subsidiary of a United States parent. The assertions of counsel do not, however, constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 50-3, 506 (BIA 1980).

In sum, the record lists four apparently interrelated companies: (1) NMC Enterprises, Inc. (the petitioner); (2) NMC Co., Ltd.; (3) Rimports, Inc.; and (4) Rimports Electronics Technology Co., Ltd. Given the inconsistent evidence and the undocumented assertions about these four companies, the record cannot establish a clear qualifying relationship.

Finally on appeal, petitioner's counsel suggests another reason why the beneficiary qualifies as a manager or an executive: CIS previously granted the beneficiary I-1A status on two prior occasions. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. The record of proceeding does not contain a copies of the visa petitions that counsel claims the director previously approved. If the director approved the previous nonimmigrant petitions on the same unsupported assertions contained in the current record, the approvals would constitute clear and gross error on CIS' part.

CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of potentially erroneous prior approvals. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO is not bound to follow a service center's contradictory decision.

Louisiana Philharmonic Orchestra v. INS, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The prior approvals, therefore, cannot establish that the beneficiary's proposed duties will be managerial or executive or that a qualifying relationship exists between the petitioner and a Chinese entity.

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.