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U.S. Citizenship
and Immigration
Services

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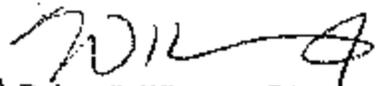
IN RE: Petitioner:
Beneficiary:

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, Hongdou Group (USA), states that it is the wholly-owned subsidiary of a Chinese company, Hongdou Group Nan Guo Enterprise Company. The petitioner states that it trades textile products internationally. The U.S. company claims to have been incorporated in the State of California on March 10, 1998. In September 2000, the U.S. entity petitioned U.S. Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). CIS approved the petition as valid from November 26, 2000 until November 26, 2001. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president at an annual salary of \$36,000.

On August 12, 2002, the director determined that the petitioner had failed to demonstrate a qualifying relationship with a foreign entity. Consequently, the director denied the petition.

On appeal, counsel contends that the petitioner has a qualifying relationship with a foreign company and submits evidence to support this contention. Additionally, counsel asserts that the attorney who represented the petitioner before the director provided ineffective counsel.

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.

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

Initially, the AAO will address the question of whether the petitioner established a qualifying relationship with a foreign 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:

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

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*.

On August 22, 2001, the petitioner's then-counsel submitted evidence to support the qualifying relationship claim:

- A State of California Statement by Domestic Stock Corporation, Form SO-200 N/C, filed February 22, 2001. The statement provided addresses for the petitioner's principal executive office as well as the names and addresses of the corporation's officers, directors, and agent. The statement provided no other information.
- A Year 2000 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return for the tax year beginning March 1, 2000 and ending February 28, 2001. The Form 1120 Schedule E revealed that [redacted] owned 100 percent of the U.S. entity's stock. The Form 1120 Schedule K confirmed that a single person or entity owned directly or indirectly 100 percent of the U.S. entity's stock. Schedule K did not, however, provide the owner's name. Additionally, Schedule K indicated that the U.S. corporation was not a subsidiary in an affiliated group or a parent-subsidiary controlled group.
- A legal enterprise business license for the foreign entity. The license identified the overseas entity as a Chinese "stock cooperated corporation," with capital of 35 million [redacted] and [redacted] as the legal representative.

The director determined that the above information about the two entities was inadequate to establish a qualifying relationship. Consequently, on October 27, 2001, the director issued a notice of intent to deny. On June 8, 2002, the director again issued a notice of intent to deny. The petitioner did not reply to either notice. Therefore, on August 12, 2002, the director issued a decision based on the record.

The director observed, "Most importantly, [the Year 2000 Form 1120] Schedule E . . . indicates that an individual named [redacted] owns 100 [percent] of the U.S. Corporation's common stocks, not Hongdou Group of China as claimed." The director, thus, concluded:

The U.S. entity is owned by (one) individual in the [United States], and a corporation in China owns the foreign entity. The record does not show that the two companies are owned and controlled by the same parent or individual, or that the two companies are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. There is no significant commonality of ownership that exist[s] between the United States and the foreign entities. Common control must exist for there to be a qualifying relationship.

This being the case, the evidence does not support the petitioner's claim that a subsidiary relationship exists. Based on the above cited ownership of stock, this information fails to support a finding that both organizations are owned and controlled by the same individual or by an identical group of individuals who each own a proportionate share of each organization. Further, the evidence fails to support a finding that an individual, or identical group of individuals has effective *de jure* or *de facto* control of both organizations.

In sum, the director concluded that the petitioner has failed to establish that it was either a subsidiary or an affiliate; accordingly, the director denied the petition.

On appeal, the petitioner submitted additional evidence to establish its claim that it is the subsidiary of a Chinese organization. The submitted items include:

- A State of California, Commissioner of Corporations, Notice of Transaction Pursuant to Corporations Code Section 25102(f), Form 260.102.14(c). The form states that on July 8, 2000, the petitioner offered \$150,000 in common stock for money consideration. The AAO observes, however, that the form bears no Department of Corporations fee paid or receipt number stamps in the upper left corner of the form. The AAO further notes that the signature at the bottom of the form appears to be an original. In turn, the signature suggests that the form is an unfiled, original document.
- A Year 2001 IRS Form 1120 for the tax year beginning March 1, 2001 and ending February 28, 2002. Schedule K and Form 5472 indicate that Hongdou Group Nan Guo Enterprise Company owns at least 25 percent of the petitioner's stock. Schedule K and Form 5472 do not state, however, whether other entities own stock in the petitioner and, if so, in what percentages, or whether Hongdou Group Nan Guo Enterprise Company owns a majority or 100 percent of the stock in the petitioner.
- March 15, 1998, minutes of the petitioner's organizational meeting. The minutes authorized 1,500 shares of common stock to be sold for money consideration of \$100 per share. The AAO notes that, according to the minutes, the petitioner elected to be an S Corporation for income tax purposes. Furthermore, the AAO observes that the petitioner left several blanks on the form; for example, the minutes do not specify where the U.S. entity will establish its bank account. Similarly, although the board approved a proposed form of seal of the corporation, the minutes contain no sample of the seal's words and figures.
- A stock transfer ledger reporting that the U.S. entity transferred 1,500 shares of stock for money consideration of \$150,000 to Hongdou Group Nan Guo Enterprise Company on July 8, 2000. The evidence did not, however, contain a copy of stock certificate number one attesting to this transaction.

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, if CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetkhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The evidence submitted on appeal, rather than clarify questionable facts, suggests further factual inconsistencies. For instance, the March 15, 1998 minutes indicate that the petitioner has structured itself as a Subchapter S corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. The petitioner claims, however, to be the subsidiary of a foreign corporation and submitted Form 1120 for Years 2000 and 2001 rather than Form 1120S, U.S. Income Tax Return for an S Corporation. Additionally, the evidence submitted on appeal did not resolve the stock ownership inconsistencies. In particular, the Year 2000 corporate income tax return reported that [redacted] owned 100 percent of petitioner's stock. In contrast, the stock transfer ledger does not report a transfer from [redacted] to the Chinese entity; instead, the transfer ledger states that the stock was originally issued to the Chinese entity. Furthermore, the petitioner did not explain why the Notice of Transaction lacks appropriate fee and number stamps and bears what appears to be an original signature. Finally, the petitioner failed to explain why the March 15, 1998 minutes contain no sample of the

corporate seal. Summing up, the evidence submitted on appeal does not resolve factual inconsistencies in the record.

Moreover, 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. INS*, 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). The evidence submitted on appeal does not contain essential documentation. Specifically, the stock transfer ledger alludes to stock certificate number one; however, the record does not contain a copy of the certificate, thus, undermining the ledger's credibility. In short, the documentary evidence submitted on appeal does not meet the petitioner's burden of proving the existence of a qualifying relationship.

On appeal, the petitioner's counsel asserts that the petitioner's prior counsel ineffectively represented the U.S. entity. Specifically, counsel states that the petitioner's former counsel should have responded to the two notices of intent to deny with additional evidence. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), aff'd, 857 F.2d 10 (1st Cir. 1988).

First, the appeal does not contain an affidavit from the allegedly aggrieved respondent. Second, nothing on the State Bar of California complaint form suggests that the petitioner or the beneficiary served a copy of the form on the prior counsel. The record contains no responses to the complaint from the previous attorney. Third, although the beneficiary filed a complaint with The State Bar of California on September 6, 2002, the record contains no evidence that the bar association determined that the prior counsel had acted improperly. Therefore, the AAO cannot sustain this appeal based on the prior counsel's alleged ineffectiveness.

Beyond the decision of the director, the AAO notes that the proposed duties are not primarily managerial or executive. See Sections 101(a)(44)(A), (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A), (B). 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(I)(3)(ii). The record contains limited information about the proposed duties and about the duties of the beneficiary's proposed subordinates. The Form I-129 described the beneficiary's proposed responsibilities as: "Plan, develop, and establish policies and objectives of business organization in accordance with board directives and corporation charter." An August 21, 2001 letter submitted in support of the Form I-129 states:

[The beneficiary] is vested with the authority to confer with company officials to plan business objectives, and to establish responsibilities and procedures for attaining objectives. She also directs and coordinates promotion of products to develop new markets, increase share of market, and obtain competitive position in business [sic].

* * *

In addition, [the beneficiary] reviews activity reports and financial statements to determine the progress of the company. She needs to direct and coordinate the formulation of financial programs to provide funding for new or existing operations to maximize returns on investments. Her staff will prepare reports for their meetings on new ways of funding for the company. Also, with the assistance of subordinates, she can determine the demand for [the petitioner's] products and services.

The petitioner also submitted an organizational chart. The chart lists the beneficiary as supervising a manager. In turn, the manager supervises a sales representative, a purchase agent, and an office clerk. Although the chart provides the names of the employees who hold these positions, the chart does not elaborate on the positions' duties.

The beneficiary's duties listed above are too broad and nonspecific to convey an understanding of her proposed daily responsibilities. As an illustration, although the petitioner uses such words and phrases as "plan, develop, and establish policies and objectives" and "direct and coordinate" promotions and financial programs, to describe the beneficiary's proposed duties, the petitioner does not define or quantify any of these terms. As noted earlier, 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. INS, supra; Republic of Transkei v. INS, supra; Matter of Treasure Craft of California, supra*. Additionally, 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 depicted above suggest that the beneficiary will devote a significant amount of her time to marketing. For instance, she will develop new markets, increase market share, and determine the demand for the petitioner's products and services. 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).

Finally, as previously noted, the petitioner's organizational chart did not describe the duties of the beneficiary's subordinates; consequently, the U.S. entity has not demonstrated that the beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve her from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act.

In short, the evidence discussed above precludes CIS from classifying the beneficiary as an executive or managerial employee. However, as the appeal will be dismissed, the AAO will not examine any further the issues of whether the beneficiary's duties are primarily managerial or executive.

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Page 8

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 satisfied this burden.

ORDER: The appeal is dismissed.