

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



U.S. Citizenship
and Immigration
Services

D7

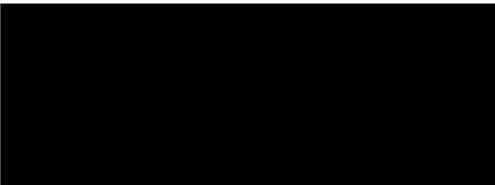


FILE: WAC 02 103 51027 Office: CALIFORNIA SERVICE CENTER Date: **MAY 26 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

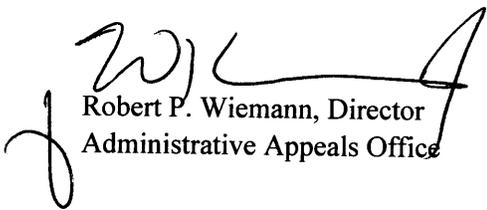
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner was incorporated in the State of California in December 2000. The petitioner imports, exports, sells, and acts as a manufacturer's representative. Although the beneficiary was originally authorized to work for a different corporation, the petitioner now seeks to extend the temporary employment of the beneficiary as president for an additional two years. Accordingly, it filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee.

The director denied the petition determining that the petitioner had not: (1) met the criteria for a qualifying organization; (2) established that the beneficiary had been and would continue to be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner contends that Citizenship and Immigration Services (CIS) erred in its determination.

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) 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.
- (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 first issue in this proceeding is whether a qualifying relationship exists between the foreign and U.S. entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(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.

The petitioner stated on the petition that “[the petitioner], the U.S. subsidiary, is 100% owned and controlled by Shanghai Xiali Shipping and Hotel Facilities Co., Ltd. which also owns and controls 60% shares of America Huachen International, Inc., of which was taken [sic] over in total shares of China Hua Yuan Industry & Commerce Development Corporation in December 1998.” The beneficiary was previously the president of China Hua Yuan Industry & Commerce Development Corporation, from 1992 to 1998.

The petitioner explains in a statement accompanying the petition that America Huachen International, Inc. (America Huachen) was the initial petitioner for the L-1A intracompany transferee classification of the beneficiary. America Huachen was incorporated in the State of California in May 1995. Two Chinese companies owned America Huachen: (1) Hua Yuan Industry & Commerce Development Corporation (Hua Yuan) owned 60 percent of America Huachen and was the beneficiary's foreign employer, and, (2) China Hua Chen Economic & Technology Development Center owned 40 percent. The petitioner claims that in December 1998, Shanghai Xiali Shipping and Hotel Facilities Co., Ltd. (Shanghai Xiali) took over and merged with Hua Yuan.

The petitioner further explains that America Huachen experienced business difficulties due to mismanagement and embezzlement by a former employee. In mid-1998, America Huachen filed for bankruptcy. Criminal charges were filed against the employee in December 1999. The petitioner claims that in December 2000, Shanghai Xiali instructed that a new subsidiary be incorporated and that all business activities and operations be conducted through the new subsidiary. The petitioner further claims that all America Huachen's employees and managers are now working for the new subsidiary. The new subsidiary is the petitioner in this matter.

The beneficiary's initial L-1A visa was approved for a period beginning January 23, 1998 to February 1, 2000. The beneficiary's L-1A stay was extended for a period beginning February 1, 2000 to January 31, 2002. America Huachen was the petitioner in both matters. The petitioner claims that the beneficiary continues to manage, oversee, control and supervise all Shanghai Xiali subsidiaries including America Huachen, Unichem International, Inc.,¹ and the petitioner in this matter.

The record contains a statement on Shanghai Xiali letterhead dated January 5, 2000. The statement references Shanghai Xiali's purchase and merger with Nantong Hua Yuan Industry & Commerce Development Corporation into one business entity.

The director observed a number of inconsistencies in the record:

The director questioned the difference in dates between the document showing Hua Yuan's purchase of America Huachen and the California State Form Notice of Transaction showing the purchase was for consideration other than money.

The director made the same observation regarding the difference in dates for Shanghai Xiali's purchase of the petitioner and the California State Form Notice of Transaction.

The director observed that the invoices offered to substantiate Hua Yuan's purchase of America Huachen's stock were dated some time after the stock was allegedly issued.

The director noted that America Huachen had not submitted Internal Revenue Service (IRS) Forms 1120 for years subsequent to 1998. The director questioned why the petitioner would

¹ The petitioner claims that Hua Yuan initially incorporated Unichem International, Inc. in 1997 but Unichem International, Inc. did not become operational until May 1998.

claim that America Huachen was continuing to do business and fail to submit IRS Forms 1120 to substantiate the claim.

The director noted the similarity in style and substance of corporate resolutions executed on behalf of the petitioner and Unichem International, Inc. The director questioned their credibility as the resolutions were issued three years apart and were on behalf of two different companies.

The director concluded that the record did not show that the foreign entities and the three United States entities met the criteria for a qualifying relationship.

On appeal, counsel for the petitioner offers reasonable explanations for the inconsistencies the director observed. However, counsel's assertion is not persuasive as it relates to the critical question of the relationship between the beneficiary's overseas employer and the U.S. petitioner.

Critically, the record does not contain documentary evidence of Shanghai Xiali's purchase and merger with Hua Yuan Industry & Commerce Development Corporation, the beneficiary's overseas employer. The current petitioner is owned by Shanghai Xiali. Shanghai Xiali's January 5, 2000 letter is not sufficient to establish that the two companies were merged into one business entity and that Shanghai Xiali thereby created a qualifying relationship with the beneficiary's foreign employer. 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).

Moreover, the beneficiary's United States employer apparently changed in December 2000 when the petitioner was created. This petition was filed by the newly created entity not by America Huachen, the beneficiary's prior L-1A employer. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Although the beneficiary apparently continued to act on behalf of American Huachen during the bankruptcy proceedings, this petition was filed on behalf of a separate entity. In this matter, the petitioner is not the same United States entity that initially obtained approval for the beneficiary's visa classification. The change in the beneficiary's employer to a separate and distinct entity constitutes a fundamental amendment to the approved relationship and capacity of employment pursuant to 8 C.F.R. § 214.2(l)(7)(i)(C) and necessitates the submission of documentation to demonstrate that a qualifying relationship exists and that the beneficiary is eligible for this classification with the advent of the new employer. In addition, if the petitioner had filed the initial petition in 2000 after its incorporation, it would now need to satisfy the strict evidentiary requirements of 8 C.F.R. § 214.2(l)(14)(ii) as they apply to the extension of a "new office" petition. By filing the current petition to "extend" the beneficiary's employment when it did not file the original petition, the petitioner seeks to avoid the scrutiny applied by the regulations to a new office extension petition.

The petitioner has not established a qualifying relationship with the beneficiary's foreign employer.

The second issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity for the petitioner.

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.

The petitioner stated on the I-129 petition that the beneficiary's duties for the past three years included:

[P]lanning, developing and establishing business policies and objectives; reviewing business reports and financial statements; directing and coordinating financial projects and investment portfolios; evaluating and determining business performance of all employees of the U.S. subsidiaries; supervising, firing and terminating employment of employees and managers of the business firm.

The petitioner stated that the beneficiary's proposed duties would include:

[D]irect, control and coordinate business relationship between foreign parent companies and the U.S. subsidiaries; to work on, formulate and determine business administrative and operational polices and rules; to review and analyze business operational activities including cost, accounting, investment, marketing, sales and plans; to supervise, hire and terminate employment of employees, etc.

In a letter submitted with the petition, the petitioner indicated that the beneficiary had accomplished several tasks including:

Filing lawsuits against [America Huachen's] former manager; investigating, clarifying and confirming total assets and funds the former employee embezzled and reporting same to the foreign parent companies and relevant government departments; paying all taxes, customs duties, utilities and legitimate account payables; chairing corporate meetings to restore America Huachen's business operations; setting up Unichem International, Inc. in case of business interruptions due to America Huachen's situation; processing compliance applications for several models of gas and diesel generators for the U.S. market; designing, creating and improving certain models of power driven equipment; and, obtaining America Huachen's dismissal from lawsuits.

The director requested: (1) a more detailed description of the beneficiary's duties in the United States and the percentage of time spent on the listed duties; (2) the number of employees at the U.S. location where the beneficiary would be employed; (3) a copy of the U.S. company's organizational chart including the names of all executives, managers, supervisors, and number of employees in each department and a description of job duties for all employees under the beneficiary's supervision; and, (4) copies of the U.S. company's payroll summary, W-2s and W-3s evidencing wages paid to employees for the 2001 year.

In response, the petitioner provided the beneficiary's statement regarding his duties for the petitioner. The beneficiary stated his duties included:

- 1) To plan, develop, and establish business policies and objective
- 2) To review business reports and financial statement
- 3) To direct and coordinate the formation of financial programs and business investment portfolios
- 4) To evaluate and determine business performance of all managers at different levels, supervise, hire and terminate employees
- 5) To direct control and coordinate business relationship between our parent company and other U.S. business
- 6) To coordinate with foreign parent company for the R & D of our new product
- 7) To review and analyze business operational activities including cost, accounting, investment, marketing and sales
- 8) To work with outside professional to deal with various U.S. agent

The beneficiary indicated that the percentage of time he spent on the various duties varied according to the demands of the company, project, customers, and employees. The beneficiary provided the same list of duties for his responsibilities to America Huachen except item six was amended to: "to coordinate with police to investigate the criminal case of [its former employee]. The petitioner also provided its organizational chart

showing the beneficiary in the position of president and as the sole employee in the purchasing department. The organizational chart depicted four other departments including sales, parts and services, accounting, and coordinating departments. The organizational chart showed a total of 11 positions. The petitioner's California Form DE-6, Employer's Quarterly Return for the quarter ending December 31, 2001 identified six employees. Three of the employees identified on the California Form DE-6 were associated with positions in the sales department, parts and service department, and coordinating department. The California Form DE-6 also confirmed the employment of the beneficiary. The petitioner also provided a list of its current employees.

The director observed that the record did not establish that America Huachen was doing business. The director determined that the petitioner's California Form DE-6 did not support the number of positions listed on the petitioner's organizational chart. The director observed that it appeared the beneficiary would be performing many of the petitioner's day-to-day operations. The director concluded that the record contained insufficient evidence to establish that the beneficiary would be employed primarily in a managerial or executive capacity.

On appeal, counsel for the petitioner contends that [CIS] ignored the voluminous evidence that the beneficiary had been leading the overseas company out of its U.S. subsidiary's embezzlement and bankruptcy. Counsel also claims that the beneficiary had to establish a new product line to market diesel generators that included obtaining patents, a trademark, and the Environmental Protection Agency's approval. Counsel further asserts that the beneficiary is in the process of merging the three companies (America Huachen, Unichem International, Inc., and the petitioner) into one company.

Counsel's assertions are not persuasive. When 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(l)(3)(ii). The petitioner's description of the job duties 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.* A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner initially provided a vague and nonspecific description of the beneficiary's proposed duties. For example, the petitioner states that the beneficiary's duties include "direct, control and coordinate business relationship between foreign parent companies and the U.S. subsidiaries," and "formulate and determine business administrative and operational policies and rules," and "review and analyze business operational activities," and "supervise, hire and terminate employment of employees." The petitioner did not, however, define the business administrative and operational policies and rules, or sufficiently clarify the business relationship between the foreign entities and petitioner. 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*. Specifics are clearly 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).

Moreover, the petitioner's description of the beneficiary's tasks and accomplishments are more indicative of an individual who is performing necessary operational tasks such as investigating the embezzlement of

America Huachen's assets, paying accounts, processing compliance applications, and designing and improving the petitioner's core 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).

Further, in response to the director's request for a more detailed description of the beneficiary's duties, the beneficiary generally paraphrased portions of the statutory definition of executive and managerial capacity. *See* section 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). The petitioner depicted the beneficiary as developing and establishing business policies, directing and coordinating programs and portfolios, and evaluating, hiring, and firing employees. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava, supra; Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Counsel's claim that the beneficiary is primarily an executive or manager is without merit. Despite the director's request for the percentage of time the beneficiary spent on various duties, the petitioner failed to document what proportion of the beneficiary's duties would be managerial and executive and what proportion would be non-managerial and non-executive. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO cannot conclude that the beneficiary is primarily performing the duties of a manager or executive. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Based on the evidence presented, the AAO cannot conclude that the beneficiary has been or would be employed in the U.S. entity in a primarily managerial or executive capacity.

For the foregoing reasons, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary had been employed by the overseas entity in a managerial or executive capacity as defined at section 101(a)(44) of the Act. As observed above, Shanghai Xiali did not employ the beneficiary prior to entering the United States as a nonimmigrant and the petitioner did not provide a comprehensive description of the beneficiary's duties for Hua Yuan. Specifics are clearly 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, supra*. For this additional reason, the appeal will be dismissed.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.