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Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services



FILE: WAC 02 146 52891 Office: CALIFORNIA SERVICE CENTER Date: OCT 21 2004

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

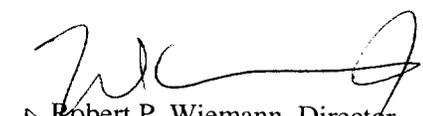
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

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invasion of personal privacy

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**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 claims to be an importer and exporter of electronic products. It seeks to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had failed to establish that (1) a qualifying relationship existed between the U.S. and foreign entities; and (2) the beneficiary will be primarily employed in a managerial or executive capacity.

On appeal, counsel contends that a qualifying relationship does exist between the U.S. and foreign entities, and that the beneficiary's duties will primarily be managerial or executive in nature.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

According to the evidence contained in the record, the petitioner is an importer and exporter of electronic products. The petitioner claims to be an affiliate of Shanghai Kingstronic Import and Export, Ltd. (SKL). The petitioner also claims that the U.S. entity and the foreign entity are 100 percent owned by China National Electronics Import & Export Beijing Company (CEIEC Beijing). The petitioner was incorporated in 1987 and declares one employee. The petitioner seeks the beneficiary's services as president for a period of three years, at a yearly salary of \$36,000.00.

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

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(G) state:

*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 (1)(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.

In pertinent part, the regulations define "parent," "branch," "subsidiary," and "affiliate" as:

*Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

*Branch* means an operation division or office of the same organization housed in a different location.

\* \* \*

*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.

\* \* \*

*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.

8 C.F.R. §§ 214.2(l)(1)(ii)(I), (J), (K), and (L).

In the instant matter, the petitioner claims to be an affiliate of the foreign entity. The petitioner also claims that both the U.S. and foreign entities are 100 percent owned and controlled by their parent company. Initially, the petitioner submitted into evidence copies of the petitioner's Articles of Incorporation; Stock Certificates and Notice of Transaction Pursuant to the Corporation Code Section 25102(f); Federal Income Tax Return Form 1120, 4562, and 4797 for fiscal year 2000; California Corporation Income Tax Returns for fiscal year 2000; Form 941, Employer's Quarterly Federal Tax Return for four quarters; and Form W-3, Transmittal of Wage and Tax Statements for 2000. The petitioner also submitted as evidence, copies of the claimed parent company's brochure and catalogue, business license, financial statement for 2000, and business transaction records. The petitioner submitted as evidence, copies of the foreign entity's company brochure and catalogue, property registration certificate, business license, and business transaction records.

In response to the director's Notice of Intent to Deny, the petitioner acknowledged that an error had been made with its tax returns. The petitioner submitted a letter from the petitioner's tax preparer, which stated that she had completed the necessary tax forms to correct the error made on the company's 2000 tax return. Additionally, the petitioner submitted copies of tax documents showing that the tax preparer had completed the forms necessary to amend the petitioner's 2000 tax returns.

The director denied the petition after determining that the record did not establish that a qualifying relationship exists between the U.S. and foreign entities. The director stated that an inconsistency existed where a copy of the U.S. entity stock certificate showed that CEIEC owned fifty thousand shares of stock in the U.S. entity for which it paid \$100,000; and copies of the U.S. entity's Federal and State Corporate Tax Returns for the year 2000 demonstrated that no affiliate relationship existed between the U.S. and foreign entities. The director further stated that, although tax documents were submitted in response to the Notice of Intent to Deny to show that the U.S. entity's tax return for 2000 had been amended, there was no evidence to show that the amendments had actually been filed. In reviewing the inconsistencies, the director stated that the evidence presented did not establish that an affiliate or a subsidiary relationship between the U.S. and foreign entities existed.

On appeal, counsel asserts that the Citizenship and Immigration Services (CIS) erred in finding that no qualifying relationship existed between the U.S. and foreign entities based solely on inconsistencies between the stock certificates and tax return. Counsel also states that the inconsistencies were resolved by independent objective evidence specifically, amended 2000 Federal and State Corporate Tax Returns. Counsel further states that the petitioner's accountant recognizes its incorrect assumption in preparing the tax returns. In addition, counsel states that prior corporate tax returns for the years 1996 to 1998 show that CEIEC owns 100 percent of the petitioning organization. Counsel asserts that other independent objective evidence in the form of stock certificates, and company brochures submitted with the original petition all certify 100 percent ownership of the petitioner by CEIEC. The petitioner submits as evidence: Form 1120X, Amended U.S. Corporation Income Tax Return; attached with Form 5472 and revised Form 1120; Form 100X; Amended Corporation Franchise or Income Tax Return; attached with revised Form 100; and proof of filing the Tax Amendments. The petitioner also submitted copies of its Form 1120, U.S. Corporate Income Tax Return for the tax years 1996, 1997, and 1998; an affidavit from the petitioner's accountant; a copy of the petitioner

company's stock certificate issued to CEIEC; a partial copy of the company's brochure already submitted; and a translated version of a State's Ownership Registration Form that demonstrates the parent company's ownership of the foreign entity.

In review of the record, there has been insufficient evidence submitted to establish the existence of a qualifying relationship between the U.S. and foreign entities. See Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l)(1)(ii); 8 C.F.R. § 214.2(l)(3)(i); and 8 C.F.R. § 214.2(l)(1)(ii)(G). On appeal, the petitioner submitted amended tax returns and revised corporate tax forms. Like a delayed birth certificate, the amended corporate tax returns and the revised federal income tax forms submitted two years after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991)(discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). In the instant case, amending the tax returns only after the director points out the discrepancies is insufficient to establish the existence of a qualifying relationship between the U.S. and foreign entities at the time the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

In addition, the petitioner submitted copies of the U.S. entity's Article of Incorporation, stock certificate issued, IRS Form 1120 for 2000, and Notice of Securities Transaction dated April 2, 1987. The Articles of Incorporation demonstrate that a total of 100,000 shares of common stock are to be issued by the U.S. entity. Company stock certificate number one demonstrates that 50,000 shares of stock were issued to China National Electronics Import & Export Corporation on January 26, 1987. The Notice of Transaction indicates that the value of the securities sold was \$100,000. However, Form 1120, schedule L, line 22 indicates that the U.S. entity has issued 300,000 shares of common stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The second issue presented in this proceeding is whether the petitioner has established that the beneficiary will be primarily employed in a 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.

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

If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the Attorney General shall take into account the reasonable needs of the organization component, or function in light of the overall purpose and stage of development of the organization, component or function. An individual shall not be considered to be acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

The petitioner, in describing the beneficiary's proposed duties with the U.S. entity, states:

. . . . [The beneficiary] will be responsible for overseeing the business to ensure the company adheres to the delineated business plan. As President, [the beneficiary] will direct [the U.S. entity's] business operations as well as plan marketing development activities. He will

formulate strategic business policies and goals, including administrative and operational procedures. He will target and build relationships with specific U.S. companies that possess advanced technology and equipment to facilitate investment in and export to the China market. In addition, he will represent the company in critical business negotiations and approve major business contracts. [The beneficiary's] priority will be to focus on developing the company's OEM manufacturing business line and semiconductor equipment export line in conjunction with the two-year business plan for the company.

In this phase of organizational development, [the beneficiary] as president, will be engaged in a variety of activities not normally performed by one at an executive or managerial level. Following a reasonable time for reorganization and redevelopment, beneficiary's [sic] duties will be solely managerial or executive in nature. . . Due to the current needs of the business and development stage, [the beneficiary] will at the outset be providing a management function without personnel responsibilities.

The petitioner submitted copies of Form DE-6, Quarterly Wage and Withholding Report, for the last four quarters; Form DE-7X, Annual Reconciliation Statement for 2000; Form DE-88, Payroll Tax Deposit for the last four quarters; and Form W-2, Wage and Tax Statement for 2000 and 2001. An organization chart of the U.S. entity shows that the beneficiary, as company president, will report to the chairman. The chart also shows that the beneficiary will manage a product and market manager, secretary, and after-sale service manager, of which all are currently vacant.

In response to the director's Notice of Intent to Deny, the petitioner stated:

Although the company has been in existence since 1987, it is currently in a stage of reorganization and radical shift in management. It is starting anew with no employees, as its only remaining employee, [REDACTED] left the company effective April 1, 2002. Petitioner requires a qualified executive/management transferee to provide leadership and direction for the company in the U.S. [sic] during this new phase.

The director determined that the record did not establish that the beneficiary would be primarily employed in either a managerial or an executive capacity. The director stated that the petitioner's claim that the beneficiary manages a business does not necessarily establish eligibility for classification as an intercompany transferee. The director also stated that the U.S. entity's organizational structure does not warrant having an executive. The director further stated that the evidence was not sufficient to establish that the majority of the beneficiary's duties would be primarily directing the management of the organization. The director noted that rather than directing the management of the organization, the beneficiary would be performing all aspects of the day-to-day operations of the business by himself.

On appeal, counsel disagrees with the director's decision and asserts that the petitioner has provided sufficient evidence to establish that the beneficiary will be employed in a managerial or executive capacity. Counsel continues by stating that although the company has been in business since 1987, it is currently in a stage of reorganization. Counsel also states that the company is starting anew with no employees. Counsel asserts that the beneficiary will retain new employees to conduct the day-to-day operations of the business. Counsel also contends that AAO has recognized single employee operations where the beneficiary's primary function is to plan, organize, direct and control an organization's major functions through other people, including

outside consultants and independent contractors. Counsel contends that although the petitioner currently has no employees, the organization can support a managerial or executive position.

Counsel's assertions are not persuasive. The record as presently constituted does not demonstrate that the beneficiary will be employed by the U.S. entity in a primarily executive or managerial capacity. The record reveals that the petitioner had been doing business for more than one year at the time the petition was filed. Therefore, it is not to be considered a new office pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(F) for purposes of evaluating the beneficiary's proposed position. The petitioner infers that the U.S. entity is still in its developmental stages. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows a new operation one year within the date of approval of the new office petition to support an executive or managerial position. In the instant case, the petitioner has been in business since 1987. The petitioner has failed to present sufficient evidence to establish that it has reached the point where it can employ the beneficiary in a predominantly managerial or executive position.

Although the petitioner contends that the beneficiary will be responsible for the day-to-day development and operation of the U.S. company, there has been no documentary evidence submitted detailing how he will carry out those duties. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary would be directing the management of the U.S. entity. There is no evidence submitted to show what percentage of time will be attributed to each of the beneficiary's managerial or executive versus non-qualifying duties. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

There is no evidence to show that the U.S. entity employs any full-time workers. The evidence of record shows that the last employee of the U.S. entity resigned in April of 2002. Moreover, the evidence of record demonstrates that the beneficiary will perform the services of the organization, rather than directing the activities of the organization. As case law confirms, an employee who primarily performs the tasks necessary to produce a product or to provide a service 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). There has been no plausible explanation given for the absence of employees to conduct the day-to-day operations of the U.S. entity.

Based upon the evidence submitted it does not appear that the reasonable needs of the petitioning company would plausibly be met by the services of the beneficiary as president. Counsel admits that currently, the U.S. entity does not employ any individuals. Although the record may demonstrate that the petitioner employed two individuals, there has been nothing submitted to demonstrate their duties or whether they were employed on a full-time basis. Based upon statements made by counsel and the petitioner, it appears that the U.S. entity is currently in the process of reorganizing and reshaping its structure to comport with its business environment. However, based upon when the U.S. entity was established, the AAO cannot treat it as a new entity for purposes of eligibility. The petitioner must show that the organization has been doing business and is in a position to support a managerial or executive position at the time the petition was filed. The AAO does not view the entity as a start-up and therefore, cannot consider the beneficiary's proposed start-up activities as being primarily managerial or executive in nature. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary will manage an essential function of the organization.

Furthermore, the information provided by the petitioner describes the beneficiary's proposed duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the issues raised by the director. The following duties are without any context in which to reach a determination as to whether they are qualifying as executive or managerial: responsible for making major business decisions, negotiating deals, developing new business, overseeing the implementation of all business plans, and formulating strategic policies and goals.

The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he would be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he would receive only general supervision or direction from higher level individuals. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Paraphrasing the regulations as a substitute for a description of the beneficiary's day-to-day job duties is insufficient to demonstrate that the beneficiary is acting in an executive or managerial capacity. *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*, 1977 WL 188942 at \*5 (S.D.N.Y.). There has been no evidence presented to demonstrate what goals and policies the beneficiary, in his capacity, will establish.

In summary, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The evidence of record does not demonstrate that the U.S. entity is currently structured to support a managerial or executive position, nor has it been shown that the petitioning entity possesses the organizational complexity to warrant supporting a managerial or executive position. Accordingly, 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. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.