



U.S. Citizenship
and Immigration
Services

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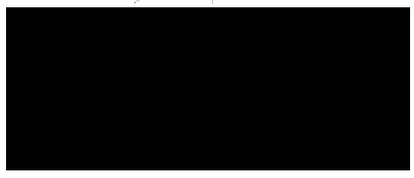


FILE: SRC 02 216 50137 Office: TEXAS SERVICE CENTER Date: **OCT 28 2004**

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

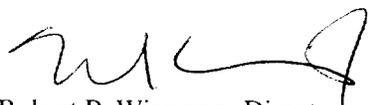
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

The petitioner is a limited liability company organized in the State of Texas in May 2002. It trades in carpets, furniture, textiles, and fabrics. It seeks to temporarily employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petition was filed July 5, 2002, thus the petitioner is considered a new office. The petitioner claims that it is the subsidiary of CHM Commodity Trade, located in Kuala Lumpur, Malaysia.

The director denied the petition concluding: (1) that the petitioner had not established that the U.S. entity and the foreign entity were qualifying organizations; (2) that the petitioner had not obtained sufficient physical premises to house the new office; (3) that the petitioner would not, within one year of approval of the petition, support an executive or managerial position; (4) that the foreign entity is not currently doing business; and, (5) that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel contends that: (1) both the U.S. and foreign companies are qualified companies; (2) the U.S. company has a showroom and office; (3) the foreign company did and will support the U.S. company financially; (4) the foreign company is still doing business in Malaysia; and (5) the beneficiary is in a managerial capacity.

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)(v) states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) sufficient physical premises to house the new office have been secured;
- (B) the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

- b. the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- c. the organizational structure of the foreign entity.

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 has provided the following information regarding its relationship with the foreign entity:

A notation on the Form I-129, Petition for a Nonimmigrant Worker, that the U.S. entity is a wholly owned subsidiary of the foreign entity;

A translation of the foreign company's registration showing that it was registered in Malaysia in August 2000;

A partial translation of a document indicating that Sii Sing Sing, an individual, was trading as CHM Commodity Trade, the foreign entity in this matter;

A copy of the petitioner's Articles of Organization filed with the Office of the Secretary of State of Texas on May 8, 2002, organizing the petitioner as a limited liability company. The Articles of Organization were signed by "CHM House Commodity Trade, Member, by Zhi Yang Wang, [the beneficiary];"

A May 21, 2002 letter in regards to Waweco, LLC certifying that the beneficiary had an account with MetroBank that had been opened May 2002 and had a balance of \$62,800;

A lease summary issued to Waweco Rugs from March 1, 2002 to June 14, 2002 showing the beneficiary as the tenant of the premises; and,

A lease agreement between the beneficiary as an individual doing business as Wawe Rugs and an unrelated party as the landlord.

The director questioned the authenticity of the documents submitted, noting the two different names used by the foreign entity (CHM Commodity Trade and CHM House Commodity Trade), the two different individuals signing on behalf of the foreign entity (██████████ and ██████████), and that the beneficiary had signed the Articles of Incorporation as a member of the limited liability company but on behalf of the foreign entity.

On appeal, counsel for the petitioner asserts that the foreign entity requested that the beneficiary set up the U.S. entity and that the beneficiary did so. Counsel also supplies a June 6, 2002, certificate of corporate relationship, signed under penalty of perjury by ██████████ on behalf of CHM House Commodity Trade claiming that Waweco, LLC is a wholly owned subsidiary of CHM House Commodity Trade.

On review, counsel's assertion is not persuasive. 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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*, 19 I&N Dec. at 595.

In the present matter, the record contains confusing and inconsistent evidence relating to the ownership of the petitioner. 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 record contains evidence that the beneficiary may be the actual owner of the petitioner. The beneficiary entered into a lease agreement to do business as the petitioner, the beneficiary opened a checking account for the petitioner in his own name, and the beneficiary signed the Articles of Organization as a member of the limited liability company, although the Articles of Organization also listed one of the foreign entity's names on the signature line as well.

The petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control. A sworn certificate of corporate relationship is not sufficient to establish that the foreign entity owns the petitioner, in light of the lease agreement, bank account, and the beneficiary's signature on the Articles of Organization. The record lacks any documentation regarding the purported limited liability company detailing its members and their rights and obligations, save for the Articles of Organization that list only the beneficiary.

Likewise, counsel's assertion that a qualifying relationship exists, without documentary evidence to support the claim, is not sufficient to satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. The petitioner has not overcome the director's conclusion on this issue.

The second issue in this proceeding is whether the petitioner has provided evidence that it has sufficient physical premises to house the new office. In this matter, as observed above, the beneficiary has entered into a lease agreement to open a business identified as Wawe Rugs. The petitioner has not provided evidence indicating that it is responsible for or is entitled to operate the premises located in the lease agreement.

The third issue in this proceeding is whether the petitioner has established that the petitioner would, within one year of approval of the petition, support an executive or managerial position. The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) require the following evidence to aid in establishing this element:

- a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
- b. the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- c. the organizational structure of the foreign entity.

In addition, 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.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level, and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or

managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(I)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

In the present matter, the petitioner has not provided adequate documentation establishing that the U.S. entity will sufficiently support the beneficiary in a managerial or executive position within one year of approval of the petition. The documentation submitted by the petitioner regarding the new U.S. entity includes: the proposed U.S. organizational chart and the beneficiary's duties for the U.S. entity. The organizational chart shows the beneficiary as the general manager. The chart also depicts an individual in the position of marketing manager, an individual in the position of accountant, and an individual in the position of sales manager. The Form I-129 indicates that the petitioner employs three individuals. The petitioner's request for a tax identification number indicates the petitioner employs two individuals.

In a June 6, 2002 letter appended to the petition, the petitioner stated that the beneficiary's duties could be summarized as:

1. Planning, developing, and establishing policies and objectives of WAWECO, L.L.C. according to the Board of Director and corporation charter (10% of his time);
2. Plans business objectives, develops policies for distribution, print, quality control, design, and broadcasting, and establishes responsibilities and procedure for attaining objectives (15% of his time);
3. Reviews activity reports and financial statements from accountant and makes the business decisions as to allocating capital to importing various products or continuing operations to increase sale of the imported cargoes (40% of his time);
4. Supervises the business activities in customs claims, the price quotation for the products, solve customer's complains [sic], keeping good relations with customers, and promoting sale (20% of his time);
5. Exercises discretionary power as to hiring, firing, and promoting employees (10% of his time); and
6. Acts to represent the Company in the USA and U.S.-based company (5% of his time).

In the same letter, the petitioner also noted that the beneficiary would be required to do market surveys. The petitioner also re-stated the definition of "executive capacity" and concluded that the beneficiary met the criteria set out in the definition. On appeal, counsel for the petitioner referenced the June 6, 2002 letter appended to the petition and asserted that this letter listed the beneficiary's duties for the petitioner.

The petitioner has not consistently described the scope of the U.S. entity or its financial goals. The petitioner indicates that it employs two, three, or perhaps four individuals; however, the record does not contain independent evidence substantiating the employment of any of these individuals. Although the petitioner provides its proposed organizational structure, the petitioner does not set forth its financial goals or evidence regarding the realistic expectation that the enterprise will expand to a point where there would be an actual need for a manager or executive who will primarily perform qualifying duties. Counsel's claim that the parent company deposited \$62,800 in a bank account is not sufficient to establish the foreign entity's investment in the United States or its financial ability to remunerate the beneficiary. First, as determined above, the petitioner has not established that it, rather than the beneficiary, has a bank account. Second, as

previously stated, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. at 534; *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Finally, while the petitioner provided a list of job duties to be performed by the beneficiary, it failed to submit a detailed description of the beneficiary's day-to-day duties. 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). The petitioner indicates that the beneficiary spends 65 percent of his time planning, developing, and establishing policies and objectives as well as reviewing reports in order to make business decisions. This general statement does not convey an understanding of the beneficiary's day-to-day duties. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Finally, re-stating the statutory definition of "executive capacity" is not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id*; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Based on the evidence presented, the U.S. entity will not support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition.

The director also determined that the petitioner had not established that the foreign entity is currently doing business. However, the record contains the foreign entity's invoices and an Inland Revenue Board of Malaysia tax return, as well as an unaudited financial statement. This documentation is sufficient to show that the foreign entity is conducting business. The director's determination on this issue will be withdrawn.

Beyond the decision of the director, the petitioner has not established that the beneficiary's position abroad was in a managerial or executive capacity. The foreign entity indicated that the beneficiary had been hired "to take charge in the [foreign entity's] import and export department." The foreign entity also explained that the beneficiary had also been responsible "for ordering carpets and furniture in China and for examining the quality of the products to ensure the high quality of the cargoes." The foreign entity listed the beneficiary's accomplishments as setting up an international sales network and marketing in the United States. In the foreign entity's organizational chart, the beneficiary is identified as the vice-general manager over the marketing and import and export department. The chart does not show any individuals in positions subordinate to the beneficiary.

The description of the beneficiary's job duties for the foreign entity shows an individual involved primarily in marketing, purchasing, and quality control. 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). The record does not provide sufficient evidence to establish that the beneficiary's position for the foreign entity was in a qualifying managerial or executive capacity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). For this additional reason, this petition may not be approved.

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 to deny the petition will be affirmed.

ORDER: The appeal is dismissed.