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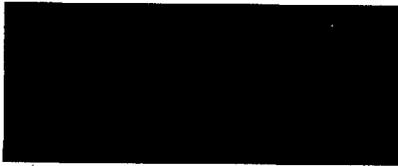
JUN 14 2005

FILE: SRC 02 156 52196 Office: TEXAS SERVICE CENTER Date:

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.


for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Furniture4garden.com, Inc., endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims to be a subsidiary of [REDACTED] Furniture Co., LTD, located in China. The petitioner is an importer and distributor of outdoor furniture and garden decoration products. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's vice president. The petitioner was incorporated in the State of Georgia on July 27, 2000 and claims to have four employees.

On October 28, 2002, the director denied the petition and determined that the petitioner failed to establish: 1) that the beneficiary has been or will be primarily performing duties in an executive or managerial capacity; 2) that a qualifying relationship exists between the petitioner and foreign entity; 3) that the petitioner had been doing business for the previous year; and, 4) that the foreign company is currently doing business.

On appeal, the petitioner refutes the director's findings, submits an explanation for each issue, and provides additional evidence for review.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties for the United States entity.

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.

On April 23, 2002, the petitioner filed the Form I-129. The petitioner described the beneficiary's proposed duties on the Form I-129 as:

She has established goals and policies for the company; direct the management of [the petitioner]; exercise day-to-day discretionary authority in making the decisions on the business activities of the company, receive general direction from the Board of Directors and implement the strategy and plan for the company; report to the parent company about the progress of the [U.S.] subsidiary.

In addition, the petitioner submitted an April 9, 2002 letter that reiterated the beneficiary's duties as described on the Form I-129.

On June 19, 2002, the director requested additional evidence. Specifically, the director requested a description of the current staffing of the U.S. entity including positions, position titles, position duties, and the qualifications required which accounts for all duties involved in running an import business. The director also requested state and quarterly tax filings for 2001 and 2002.

The petitioner responded to the request for additional evidence and submitted a September 4, 2002 letter describing the U.S. company's current staff comprised of four employees. The petitioner claimed the beneficiary, as the vice president of the company, organizes the company's operation and plans the new marketing and sales strategies. The petitioner also briefly described the job duties of the sales and marketing manager, a sales representative, and a bookkeeping and data entry person. The petitioner indicated that the company utilizes contractors for payroll services, purchasing, storage, and shipping/delivery. The petitioner's state and federal quarterly tax filings reported the beneficiary as the only employee throughout 2001 and 2002, although she did not receive wages in every quarter.

On October 28, 2002, the director denied the petition and determined that the petitioner failed to establish that the beneficiary has been or will be primarily performing duties in an executive or managerial capacity. The director found that: 1) no salaries and wages were paid during 2001 and \$15,000 in officer compensation; 2) no evidence of an amended return to substantiate the petitioner's claim on the W-2c corrected wage and tax statement stating that the employees salaries had been miscoded to another expense account; 3) the state quarterly tax return reported

employees working only during the second quarter during 2001, however, the petitioner claimed the beneficiary worked all three quarters thereby earning a low salary indicating that she did not work full-time; and, 4) the beneficiary is engaged in the day-to-day activities of the business.

On appeal, the petitioner refutes the director's findings. The petitioner claims that the AAO can contact the IRS to request a transcript of the amended return and it has attached checks that were deposited by the IRS.¹ The petitioner also explains that the beneficiary was paid \$18,000 in 2001 from April 2001 for six months of full time work and took a three month leave of absence. The petitioner also claims that employees were hired from September 2002 and that in the first year of the business, the petitioner hired independent contractors and "co-orporated [sic] with other companies."²

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the description of the beneficiary's U.S. job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary's proposed U.S. duties will include "establish[ing] goals and policies for the company" and "direct[ing] the management of [the petitioner]." The petitioner did not, however, define or clarify these duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

In addition, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). For instance, the petitioner depicted the beneficiary as "exercise day-to-day discretionary authority in making the decisions on the business activities of the company." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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*, 1997 WL 188942 at *5 (S.D.N.Y.).

The AAO notes that on appeal, the petitioner claimed that the petitioner's employees were hired from September 2002 and that it utilized independent contractors. The petitioner filed the Form I-129 on April 23, 2002. There is no evidence that the petitioner employs the claimed

¹ It is the petitioner's burden to provide supporting documentation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

² The AAO notes that although the petitioner claimed that in its first year it hired independent contractors, there is no evidence to indicate that these claimed contractors were actually hired. The 2001 U.S. Corporate Income Tax Form 1120 indicated that no salaries and wages were paid for 2001 and under Schedule A, there was no cost of labor reported. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

independent contractors and the petitioner hired its claimed employees more than four months after filing its petition. Therefore, at the time of filing the nonimmigrant petition, it appears the beneficiary as the petitioner's only employee was primarily performing the daily operations of the business. 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). Furthermore, 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).

Further, the description of the beneficiary's duties does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision, or component of the company. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but, instead, is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

As pointed out earlier, the petitioner failed to provide a sufficiently comprehensive and detailed description of the beneficiary's proposed responsibilities. Thus, the petitioner did not provide evidence sufficient to meet the burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165. In sum, the petitioner has not provided evidence that the beneficiary manages an essential function.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The second issue in this proceeding is whether a qualifying relationship exists between the petitioner and the foreign entity. The regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

(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 (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.

* * *

(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 regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and foreign organization. See *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) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa proceeding, ownership refers to the

direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

On the Form I-129, the petitioner claimed that “[The foreign entity] owns 4000 shares of the subsidiary, the beneficiary and [REDACTED] each owns [sic] 190 shares; [REDACTED] and Mr [REDACTED] each owns [sic] 320 shares.” The petitioner submitted stock certificates, its 2001 Federal Tax Return, and the foreign entity’s business license, articles, and bylaws.

On June 19, 2002, the director issued a request for additional evidence. Specifically, the director requested that the petitioner clearly document the current ownership of the foreign company.

In response to the request for additional evidence, the petitioner resubmitted the five copies of stock certificates and an investment letter indicating that the foreign company purchased 4,000 shares of the petitioner’s stock on March 5, 2001.

On October 28, 2002, the director denied the petition and determined that the petitioner failed to establish that a qualifying relationship exists between the petitioner and foreign entity. The director found inconsistent evidence in the record. Specifically, the director noted that the foreign entity claimed to be a direct 25% foreign shareholder of the U.S. entity and had purchased \$8,000 worth of stock in trade (inventory) and [REDACTED] the CEO of the petitioner, reportedly held 50 percent of the foreign entity’s stock. Contrary to these claims, the director found that the amended 2001 annual tax return stated that 1000 shares of stock were held by shareholders at the beginning and end of the year and that the foreign entity owned 80 percent of the shares or 800 rather than 4000. The director concluded that it appeared that only 1000 shares were issued, not 5000.

In addition, a March 5, 2001 memo indicated that 4000 shares were “purchased for investment for the undersigned’s [the beneficiary’s] own account.” The director also noted other discrepancies such as inconsistencies in the name of the foreign entity and a lease for a retail store located at [REDACTED] and [REDACTED] and wife [REDACTED].

On appeal, the petitioner claims that the \$1000 reported on the U.S. company’s Form 1120 was paid by the first four investors before the foreign entity purchased the U.S. entity and that the additional paid-in capital is \$55,040 paid by the foreign entity to purchase the 4000 shares of stock. The petitioner claims that in its Articles of Incorporation, it states that the U.S. company shall have the authority to issue not more than 10,000 shares with no par value and that since the foreign entity paid the \$55,040 to purchase the 4000 shares without par value, the 2001 annual return indicates only 1000 instead of 5000. Finally, the petitioner explains the beneficiary’s signature on the March 5, 2001 memo and the discrepancies concerning the foreign entity’s name.

On review, the petitioner submitted insufficient evidence to establish that a qualifying relationship exists between the petitioner and the foreign entity. To establish eligibility in this

matter, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a 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., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. In light of the many discrepancies in the record, the petitioner's evidence, which includes only stock certificates, articles of incorporation, and minutes of one shareholder's meeting, is insufficient to meet the petitioner's burden of proof.

The AAO notes that although the petitioner on appeal submitted a letter explaining several discrepancies in the record, the AAO is unclear how the petitioner's assertions are substantiated. For example, the petitioner attempts to explain why the 2001 U.S. Corporate Income Tax Return Form 1120 shows \$1000 worth of stock at the beginning and end of the year. However, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. In addition, 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).

After careful consideration of the evidence, the AAO concludes that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign entities. Therefore, for this additional reason, the petition may not be approved.

The third issue in this proceeding is whether the U.S. entity has been doing business for the previous year.

Initially, the petitioner submitted insufficient evidence to establish that the petitioner had been doing business for the previous year. Therefore, on June 19, 2002, the director requested additional evidence such as state and quarterly tax filings for 2001 and 2002, a current insurance policy and occupational license, an explanation of the restrictions upon business activity included in its previously submitted lease agreement.

In response, the petitioner submitted its state and federal quarterly tax filings for 2001 and 2002, an invoice from the parent company to the U.S. company, a copy of its lease and an explanation of the business restrictions. In its September 4, 2002 letter, the petitioner claimed, "[W]hen our company is

strong enough to fully implement our business plan, we will have our consulting services operational and we will work out with the landlord about the restrictive language of the lease.”

On October 28, 2002, the director denied the petition and determined that the petitioner failed to establish that the company had been doing business for the previous year. The director found that there were inconsistent addresses for the business. In addition, the lease indicated that it was for the Chian couple rather than for the U.S. entity. Finally, the director noted that no sales invoices, cash register tapes, or other evidence of furniture sales was submitted and the federal and state tax returns indicated that at most the company was staffed part-time for the first quarter in 2002 and one quarter in 2001.

On appeal, the petitioner claims that the petitioner was unable to place its name on the lease because of its lack of credit so the Chian couple signed the lease. The petitioner submits a letter from the landlord and the copy of checks paid for the lease term. The petitioner also explains the address discrepancies and claims that due to delivery problems an alternative address was necessary. Finally, the petitioner submits register tapes, customer checks, and purchase invoices.

On review, the petitioner has failed to establish that it has been doing business for the previous year pursuant to 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term “doing business” is defined in the regulations as “the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.” 8 C.F.R. § 214.2(l)(1)(ii). Here, the petitioner submitted several checks from customers who purchased merchandise, however checks 5766 and 1077 are dated for March 2002 and checks 1379, 4193, and 1316 are dated for May 2002. In addition, the deposit ticket submitted is dated March 2002. Although the petitioner submitted this as evidence of doing business, at the time of filing on April 23, 2002, the petitioner failed to provide sufficient evidence of doing business for the previous year since the new office petition was approved in May 2001. For this further reason, the petition may not be approved.

The AAO now turns to the fourth issue in this proceeding of whether the foreign entity continues to do business abroad.

In the request for additional evidence, the director requested evidence that the foreign entity was engaged in business operations. Specifically, the director requested such evidence as financial records, employee rosters, and invoices, bills of sale, product brochures of goods sold at or produced by the company, check register, statement of cash flows, insurance policies, and customs records, current lease, and the name of who is currently running the business.

In response to this request, in a September 4, 2002 letter, the petitioner submitted profit and loss statements, assets and liabilities statement, local value added tax records, export tax receipts, banking activities, payroll records, lease agreement, and evidence that Mr. [REDACTED] is controlling and running the foreign business.

On October 28, 2002, the director denied the petition and determined that the petitioner failed to establish that the foreign company is currently doing business. The director found that although "documents said to be payroll rosters, tax returns, and leases were submitted," there was no evidence of sales or that [REDACTED] the CEO of the petitioner and one of the original shareholder-directors, was currently running the business.

On appeal, the petitioner claims that the foreign entity has been manufacturing seats and selling them to the United States through the U.S. entity. The petitioner stated that it made payments to the state-owned import and export companies in China and submits the wire transfer application form and confirmation. In addition, the petitioner claims that it submitted several tax payment receipts for the merchandise provided by the foreign entity and invoices showing purchases made. The petitioner also explains that "Mr. [REDACTED] has been constantly visiting the states after [the foreign entity] purchased the U.S. entity" and that Mr. [REDACTED] has been running the foreign entity.

On review, the record does not establish that the parent company is still doing business abroad pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). Although the petitioner submitted some evidence of tax payment receipts and invoices showing the foreign entity's purchase of raw material for producing seats, there is insufficient evidence to establish that the foreign entity is regularly operating abroad. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. For this final reason, the 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 appeal will be dismissed.

ORDER: The appeal is dismissed.