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**U.S. Citizenship
and Immigration
Services**



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File: EAC 05 195 52379 Office: VERMONT SERVICE CENTER Date: JUN 04 2007

IN RE: Petitioner:
Beneficiary:



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

IN 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 filed this nonimmigrant petition seeking to employ the beneficiary in the position of vice president as an L-1A 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 petitioner, a corporation** organized under the laws of the State of New York, claims to be in the furniture business and alleges a qualifying relationship with [REDACTED] of China.

The director denied the petition concluding that the petitioner failed to establish (1) that it and the organization which employed the beneficiary in China are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G); or (2) that the beneficiary will be employed in a primarily executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner asserts that, after the filing of the instant petition, it became 100% owned by the foreign entity. **The petitioner further asserts that the** beneficiary will be employed in an executive or managerial capacity.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 the petitioner has established that it and the organization which employed the beneficiary in China are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). A "subsidiary" is defined in pertinent part as a corporation "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." 8 C.F.R. § 214.2(l)(1)(ii)(K).

In support of its assertion of a qualifying relationship, the petitioner submitted correspondence, business records, and organizational documents. While the petitioner's 2004 Form 1120 indicates that it was 100% owned by [REDACTED] at that time, the petitioner also submitted a letter dated May 25, 2005 in which it asserts that half of its stock was sold in 2005 to the foreign entity and [REDACTED] a subsidiary of the foreign entity. Therefore, according to the petitioner, the petitioner became a subsidiary of the foreign entity in 2005 because it now owns, directly or indirectly, half of the petitioner.

The petitioner also submitted, *inter alia*, the following documents:

- A translation of minutes from a meeting of the foreign entity's board of directors on December 14, 2004 at which the board allegedly decided to acquire a 50% interest in the petitioner. The board further decided that 95% of this 50% share would belong to the **foreign** entity and 5% of this 50% share would belong to "the US subsidiary company," [REDACTED]
- An undated "contract" (executed and notarized on April 25, 2005) in which the petitioner agrees to sell 50% of its shares to the foreign entity and its United States subsidiary, [REDACTED]. Paragraph 9 of the contract states that 90% of the 50% share would be sold to the foreign entity and 10% of the 50% share would be sold to [REDACTED]; and
- A shareholders' agreement dated May 31, 2005 in which the shareholders of the petitioner are identified as [REDACTED] (100 shares or 50%), [REDACTED] (90 shares or 45%), and the beneficiary (10 shares or 5%).;

On July 12, 2005, the director requested additional evidence. The director requested, *inter alia*, copies of all share certificates, stock ledgers, or other evidence documenting ownership and control of the petitioner.

In response, the petitioner submitted a letter dated September 12, 2005 in which it asserts that the foreign entity owns 100% of the petitioner's stock. In support, the petitioner submitted 20 stock certificates. Certificates 4 through 20 are blank. Certificates 1 (10 shares), 2 (100 shares), and 3 (90 shares) collectively

represent the issuance of 200 shares of stock to the foreign entity. All three stock certificates are dated May 31, 2005. The initial petition was filed on July 1, 2005.

On September 29, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that it and the organization which employed the beneficiary in China are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

On appeal, the petitioner asserts that, after the filing of the instant petition, it became 100% owned by the foreign entity. Therefore, the petitioner asserts that it has established that it has a qualifying relationship with the foreign entity.

Upon review, the petitioner's assertions are not persuasive.

In this matter, the petitioner has not established that it has a qualifying relationship with the foreign entity. The record is so rife with unresolved inconsistencies regarding the petitioner's ownership and control that it is impossible for Citizenship and Immigration Services (CIS) to confirm the identities of the petitioner's owner or owners. As outlined above, the petitioner has provided three different descriptions of its 2005 ownership and control. Initially, the petitioner described itself as being 45% owned by the foreign entity, 5% owned by the foreign entity's United States subsidiary, ██████████, and 50% owned by a third party. This third party is presumably ██████████ since he was listed as the 100% owner in the petitioner's 2004 Form 1120. However, since Mr. ██████████ did not individually join in the "contract" signed on April 25, 2005, this issue remains unclear. Moreover, the petitioner submitted no evidence that the foreign entity owns or controls ██████████, an essential element in establishing indirect control of the petitioner by the foreign entity, and did not explain how the petitioner could "sell" a 50% interest in itself when, according to the 2004 Form 1120, Mr. ██████████ had already been issued stock.¹

¹It must be noted that, on appeal, the petitioner attempts to submit a copy of a stock certificate purporting to establish that the foreign entity owns and controls ██████████. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Moreover, the petitioner implies on appeal that, because ██████████ allegedly established that it is owned and controlled by the foreign entity in an unrelated petition, CIS was charged with this knowledge. However, each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Therefore, the petitioner was obligated to establish that ██████████ was owned and controlled by the foreign entity in this proceeding.

Finally, it is noted for the record that, according to the corporate documents of the State of New York, ██████████ is "inactive." Therefore, even if the petitioner had established that it is owned and controlled by the foreign entity both directly and indirectly through ██████████, this would call into question the petitioner's current ownership and control and its continued eligibility for the benefit sought.

Second, the petitioner provided a shareholders' agreement dated May 31, 2005 in which the petitioner's shareholders are identified as [REDACTED] (100 shares or 50%), [REDACTED] (90 shares or 45%), and the beneficiary (10 shares or 5%). The petitioner makes no attempt to reconcile this shareholders' agreement with the "contract" or its assertions in the May 25, 2005 letter.

Third, in response to the Request for Evidence, the petitioner described itself as being 100% owned by the foreign entity. In support of this assertion, the petitioner submitted stock certificates dated May 31, 2005. The instant petition was filed on July 1, 2005. The petitioner makes no attempt to reconcile this new characterization of its ownership and control with the two earlier variations.

While the petitioner attempts to explain on appeal that it became 100% owned by the foreign entity after the filing of the instant petition, this explanation fails for two reasons. First, 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). Second, this explanation on appeal is inconsistent with the petitioner's evidence submitted in response to the Request for Evidence. In that response, the petitioner produced stock certificates dated May 31, 2005 which purport to represent the issuance of 100% of the petitioner's stock to the foreign entity. As explained above, the instant petition was filed on July 1, 2005, over one month after the purported issuance of 100% of the petitioner's stock to the foreign entity. The petitioner makes no attempt to explain why the May 31, 2005 stock certificates were not submitted with the initial petition or to reconcile this inconsistency in the evidence.

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). Accordingly, given the numerous unresolved inconsistencies in the record, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity, and the petition may not be approved for that reason.

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

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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 does not clarify in the initial petition whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Based presumably on the executive title of the proposed position, the director considered the petition as if the petitioner is asserting that the beneficiary will be performing primarily executive duties. The AAO, however, will consider the managerial classification as well given the lack of clarity in the petition.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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.

The petitioner described the beneficiary's job duties in a letter dated May 25, 2005 appended to the initial petition. **As this letter is in the record, the job description will not be repeated here. Generally, the beneficiary is described as taking "full charge of the business development and management" of the petitioner and as increasing "the company's presence and market share throughout North America and China."**

On July 12, 2005, the director requested additional evidence. The director requested, *inter alia*, a description of the petitioner's employees, wage reports, and an organizational chart for the petitioner.

In response, the petitioner submitted an organizational chart. The chart indicates that the beneficiary will report to the president and supervise a controller, a sales assistant, a marketing assistant, and a shipping assistant. The petitioner also submitted job descriptions for each of the petitioner's employees. The beneficiary is described as follows:

As Vice President, [the beneficiary] is the one who is [sic] obtained the authorization from the parent company to be the No. 2 CEO of the US entity. His job duties are working as Acting President at the President's absence in the overall matters of the U.S. company, which include management & administration, finance and business, etc.; therefore he will conduct all top decisions when president is absent. [H]e will participate in organizing and presiding over the company, designating business plans & policies, taking charge in all trading affairs of the US entity, managing employees, recruiting, training, evaluating employees, keeping in close touch with parent company and reporting to the parent company about the directions the US company is going towards; he will give instructions to Dept. Managers and writing comments upon the reports submitted to her; finally, he is the person who has the right to report to the parent company in case that he believes that the expense checks signed by the President are not for the benefit of [sic] in the best interest of the company.

The petitioner described the subordinate employees as administering accounts and performing tasks related to sales, marketing, and shipping.

The petitioner also submitted a breakdown of the number of hours that the beneficiary will devote to his various duties. Generally, the beneficiary is described as working with the president in supervising the various subordinate employees.

The petitioner did not, however, provide copies of its employees' 2004 Forms W-2.²

On September 29, 2005, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in an executive capacity.

On appeal, the petitioner asserts that the beneficiary's duties are primarily those of an executive or manager.

Upon review, the petitioner'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.*

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will organize and preside over the company; will

²It is noted that the director determined that the petitioner failed to provide copies of its Forms 941 for the first and second quarters of 2005. However, upon a review of the record, the AAO has confirmed that the petitioner did in fact provide this documentation, and the AAO has given it full consideration in adjudicating the instant appeal.

designate business plans and policies; and will take charge of the petitioner's trading affairs. However, the petitioner did not define what plans and policies will be designated or what, exactly, the beneficiary will do to "organize" the company or "take charge" of its trading affairs. The fact that the petitioner has given the beneficiary a managerial/executive title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial 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). 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).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart and job descriptions for the subordinate employees, it appears that the beneficiary will manage a staff of four employees. While the petitioner has given these subordinate employees lofty titles, the petitioner has not established that these employees are primarily engaged in performing supervisory or managerial duties. To the contrary, the subordinate employees appear to be engaged in performing tasks related to providing a service or producing a product, i.e., sales, account administration, marketing, and shipping. In view of the above, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner has not revealed the educational or skill level of the subordinate employees, the petitioner has not established that the beneficiary will manage "professional" employees.³ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.⁴

³In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

⁴While the petitioner has not specifically argued that the beneficiary manages an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will be acting primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary will do on a day-to-day basis. Moreover, as explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

It is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* In this matter, the beneficiary's job description appearing in the

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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., 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. *See* 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document what proportion of the beneficiary's duties would be managerial functions, if any, and what proportion would be non-managerial. Also, as explained above, the record establishes that the beneficiary will be primarily a first-line manager of non-professional employees. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

letter dated May 25, 2005 makes reference to an unrelated company (Beijing Holyworld Tec Co., Ltd.) and refers to the beneficiary as a "she." The petitioner offers no explanation for these inconsistencies which lead one to conclude that the job description now being attributed to the beneficiary really belongs to a different worker employed by a different company.

Accordingly, in this matter, the petitioner has failed to establish that the beneficiary will be primarily performing managerial or executive duties, and the petition may not be approved for that reason.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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.