



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D7

FILE: WAC 05 103 50662 Office: CALIFORNIA SERVICE CENTER Date: MAR 07 2007

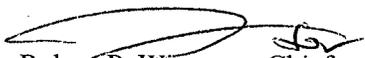
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: SELF-REPRESENTED

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, 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 filed this nonimmigrant petition seeking to extend the employment of its 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 in the State of California, claims to be the subsidiary of [REDACTED], located in Shanghai, China. The petitioner identifies itself as an importer of cashmere knitware. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was subsequently extended for an additional four years. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner and the organization which employed the beneficiary abroad are qualifying organizations.

On appeal, counsel for the petitioner contends that the director erroneously denied the petition and that the petitioner has satisfied the regulatory requirements regarding both bases of the denial. In support of these assertions, the petitioner submits a brief and additional evidence.

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)(14)(ii) provides that a visa petition, 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 the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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.

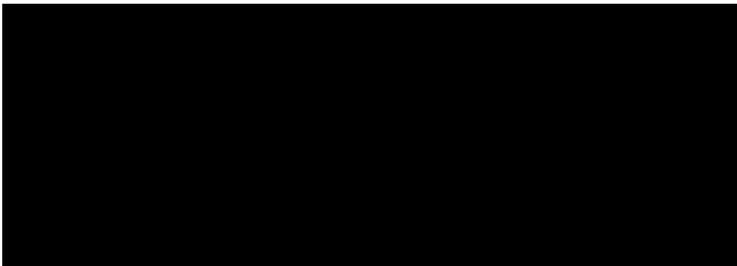
Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (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.

In a letter dated February 21, 2005, the petitioner stated that the beneficiary has been functioning as the petitioner's president since March 2000. With regard to the beneficiary's duties, the petitioner stated:

1. He determines company's policies and establishes business goals. With business nature in mind, he considers company's marketing capability, financial capability and human resources. He also considers the social and economic environment here in the United States. Then, he determines and formulates company's policies: product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy.
2. He reviews company's business reports to ensure that the company's objectives are achieved. He also analyzes operations to evaluate company's performance and to determine areas of cost reduction and program improvement. He directs financial and budget activities to fund operations and increase efficiency.
3. He makes decision to change the company's business orientation or adjust the business goals. He also decides to adjust company's policies: product policy, pricing policy, distribution policy, promotion policy, financial policy and human resource policy.
4. He reports to the parent company in China. He reports about the performance of this U.S. company and business opportunities here in the United States. He also receives information and instructions from the parent company.

The petitioner provided an organizational chart, which indicated that the beneficiary oversaw the following employees:



Finally, the petitioner submitted a copy of its quarterly tax return for the quarter ending 12/31/2004, which confirmed the employment of all persons listed above except for the two sales representatives. However, the record does contain copies of W-2 forms issued to each salesperson during the year 2004.

On March 7, 2005, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request asked the petitioner to submit a more detailed description of the day-to-day duties of the beneficiary and an organizational chart for the U.S. entity showing all employees with an explanation of their duties and job titles.

The petitioner submitted a response dated April 3, 2005. The petitioner submitted additional details with regard to the beneficiary's duties. Although the overview was identical to that submitted in the February 21, 2005 letter, the response included some specific details regarding what the beneficiary had done during the past six months. For example, the petitioner listed some of the beneficiary's goals, such as "sell \$400,000 of cashmere knitware in the 2004 Christmas season," as well as some of his decisions, including his decision to

sell the petitioner's merchandise to department stores such as Nordstrom and Neiman Marcus. The petitioner also provided a brief description of the duties and backgrounds of the beneficiary's subordinates.

On April 11, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director noted that the quarterly returns submitted established that the beneficiary only oversaw four employees, one of which was a part-time employee. The director further concluded that based on the evidence of record, it appeared that the beneficiary was performing the services necessary to the continued operation of the business and thus was not a qualified manager or executive. On appeal, the petitioner supplements the record with numerous new details regarding the beneficiary's position which were not previously submitted. The petitioner further requests consideration of the new employees hired by the petitioner who thus relieve the beneficiary from performing non-qualifying duties.

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 definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In the letter dated February 21, 2005, the petitioner provided a broad view of the beneficiary's duties. The director found this initial description insufficient to determine the exact nature of the beneficiary's day-to-day role in the company, and therefore requested a more detailed description. Although the petitioner responded to this request, it merely restated these duties in a different context and added a handful of examples of decisions and policies implemented by the beneficiary during the past six months. The petitioner failed to expand on the actual duties of the beneficiary as requested by the director.

On appeal, the petitioner does provide specific details regarding the nature of the beneficiary's duties. However, the petitioner was put on notice of this required evidence and was 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. 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). The appeal will be adjudicated based on the record of proceeding before the director.

The response to the request for evidence failed to adequately expand on the initial description or discuss any new duties not previously discussed. It remains unclear, therefore, exactly what the beneficiary does on an average work day. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *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).

Despite the petitioner's contentions that the duties discussed in the initial petition and again in the response to the request for evidence clearly qualify the beneficiary for the benefit sought, the AAO disagrees. 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 petitioner does not claim that the beneficiary supervises personnel in the list of duties provided. Therefore, the AAO will examine the record to see if the beneficiary is acting as a function manager. 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). 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, 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. 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, however, it appears that the beneficiary is directly involved in the performance of a number of marketing-style tasks. He formulates prices, plans the budget, and directly negotiates with companies such as Hanna Financial and Saks Fifth Avenue. Although there are four other employees on the petitioner's payroll, their stated duties do not include these tasks. Therefore, it appears that the beneficiary is responsible for performing a large part of the sales and marketing functions of the U.S. petitioner. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, therefore, the petitioner has not provided evidence that the beneficiary manages an essential function.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary has been and will perform primarily managerial or executive duties. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (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, or
 - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the U.S. entity is the subsidiary of the foreign entity by way of the foreign entity's 75% ownership of the petitioner. In support of this contention, the petitioner submitted a copy of the Minutes of the First Organizational Meeting dated November 9, 1999, which indicates that the

petitioner's shares are divided between the foreign entity (75%) and [REDACTED] Stock certificates and the accompanying ledger, dated January 28, 2000, were also submitted.

Additionally, copies of wire transfers were submitted, evidencing the transfer of \$5,343 and \$39,983 into the petitioner's bank account on January 10, 2000 and January 27, 2000, respectively. Several other deposits in the amounts of \$4,000, \$10,000, \$40,000, and \$3,000 were also noted on the petitioner's January 2000 bank statement without reference to the source of funds. The director, therefore, requested additional documentation proving the purchase of stock by the foreign entity in the request for evidence issued on March 7, 2005. In a response dated April 3, 2005, the petitioner explained the two wire transfers and the \$40,000 deposit all originated from the foreign entity, but that the foreign entity sent the money through affiliated companies.

Upon review of the evidence submitted, the director concludes that the petitioner failed to establish that the U.S. entity was majority owned or controlled by the foreign entity and thus was not a subsidiary of the foreign entity as defined by the regulations. Specifically, the director notes that the U.S. entity did not definitively establish that the foreign entity had purchased the claimed shares. The petitioner on appeal stresses that the foreign entity, in order to avoid delays in transferring the money to the U.S. entity, wired funds through its business partners to expedite the transfer. No evidence establishing the relationship between these companies, however, was provided.

The regulation 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; 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 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*, 19 I&N Dec. at 595.

Upon review of the record of proceeding, the petitioner has not established that it has the required qualifying relationship with the foreign entity.

In this case, the petitioner has provided documentary evidence outlining the shareholder interests in the U.S. and foreign entities, and has supplemented this evidence with explanatory statements which discuss the manner in which the majority of the shares were allegedly purchased. However, the mere claim by the petitioner that independent parties, who have not been established as business partners or affiliates of the foreign entity, purchased the stock on its behalf is simply insufficient to satisfy the burden of proof in these proceedings. 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)). Without documentary evidence to support the claim, unsupported assertions such as these do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It should be noted that upon review of the petitioner's 2003 U.S. Corporation Income Tax Return, the petitioner indicates on Schedule K that it is 100% owned by the foreign entity. Again, since there is no documentary evidence proving the stock purchase by the foreign entity, this point is moot. However, this statement also directly contradicts the claim in the record that [REDACTED] owns 25% of the U.S. petitioner. 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).

Based on the evidence presented, it is concluded that the U.S. entity was not a qualifying subsidiary of the foreign entity as of the filing date of this petition, and thus did not have a qualifying relationship as required by the regulations.

The petitioner noted that Citizenship and Immigration Services (CIS) approved other petitions that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.