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File: WAC 03 264 51182 Office: CALIFORNIA SERVICE CENTER Date: OCT 17 2008

IN RE: Petitioner:
Beneficiary:



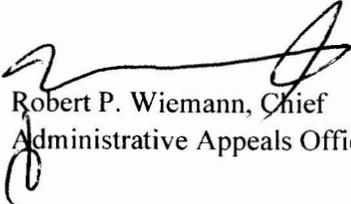
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, California 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 extend the employment of its marketing manager 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 is a corporation organized in the State of California that is engaged in the import and sale of circuit boards. The petitioner claims that it is the affiliate of Shengyi Electronics Ltd., located in Guang Dong, China. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or 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, counsel for the petitioner asserts that the beneficiary is eligible for L1A classification. Specifically, counsel claims that the beneficiary actually supervises more employees, including managers, than previously described. Counsel also claims that to the extent the director's denial is premised upon the company's gross sales figure, the figure for the year 2003 is far larger than previously stated in the application. The petitioner submits a letter and additional evidence in support of counsel's claims.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also 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.

At 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 September 12, 2003, accompanying the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's job duties as follows:

[The beneficiary] will continue to manage the marketing [d]epartment. His services are deemed essential as he provides a senior level of guidance and direction in regard to the successful implementation of [the U.S. company]'s North American development policies. He is responsible for formulating marketing strategy and sales plan based on company's policy. Conduct marketing survey, trend analysis, product promotion, advertisement and exhibition. Oversee the achievement or the monthly sales target. Review and analyze goals and sales, interact with deputy general manager, sales and technical supporters. Act as liaison between customers and the plants, to inform the company of the customer's feedback and oversee the after sales service. Accompany with the major customer's audit, follow up the audit report and feedback all the requirement from customer to the relative department. Decision-making regarding staffing, training, and career development of the marketing team; and evaluate performance of staffs and executives.

In the same letter, the petitioner indicated that it has a total of nine employees in the U.S. office. The petitioner submitted an organizational chart dated September 5, 2003 showing the beneficiary, with the title of marketing manager, along with two business development managers and an engineering supervisor under the supervision of the vice president of finance and administration. The chart indicates that the beneficiary directly supervises a "quoting/inside sales" employee and a "customer service" employee. The engineering supervisor directly supervises two technical services employees. The business development managers have no subordinate employees.

On November 6, 2003, the director issued a Notice of Intent to Deny (NOID) on the grounds that the beneficiary has not been and will not be employed in a primarily managerial capacity. The director found the record does not establish that the U.S. entity has the organizational complexity to support the beneficiary in a managerial position, that the beneficiary's duties are not primarily managerial in scope and nature, or that the beneficiary supervises a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties.

In a letter dated November 21, 2003 responding to the NOID, the petitioner asserted that in addition to managing two employees, the beneficiary also manages the essential function of marketing for the company. The petitioner elaborated on the beneficiary's responsibilities in marketing as follow:

Although our office only [has] 9 employees, since many of our U.S. customers have offices globally, as a result our marketing efforts extend also to Europe and Asia. After he was transferred to the U.S., [the beneficiary] manages the essential function of marketing for our office. He also is the Global Manager for Unicircuits, GE Medical, and Teradyne – Managing all marketing efforts in US, Europe, Hong Kong. He conducts global market research – after completing research, he provides target accounts globally. [The beneficiary] also provides consolidated annual forecast for US market to Corporate Office in Hong Kong. Implements marketing systems in US consistent with those used at Corporate office in Hong Kong. Prepares marketing presentation for all marketing and sales staff to use to capture target accounts. Manages Customer service and Inside Sales.

In the same letter, the petitioner provided the following description of the job qualifications and duties of the beneficiary's two subordinates:

Customer Service – Employed by [the U.S. entity] for 1 ½ years. Previously worked 20 years at a domestic competitor. Is responsible for all order placement, tracking, systems entry and customer interaction. Provides weekly reports to [the beneficiary] for bookings and shipments.

Inside Sales – Employed by [the U.S. entity] for 3 years. Previously worked for 22 years at various companies as inside sales/technical support. Handles all incoming quotes. Designed a quoting software that is used globally.

On January 5, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. Specifically, the director found the record does not establish that the U.S. entity has the organizational complexity to support the beneficiary in a managerial position. The director notes that the evidence does not establish that the beneficiary's daily activities or the specific scope and nature of his duties would be primarily managerial, nor does the evidence establish that the beneficiary supervises a subordinate staff of professional, managerial or supervisory personnel that would relieve him from performing non-qualifying duties. The director also rejects the petitioner's assertion that the beneficiary manages an essential

function within the company, finding that the evidence indicates that the beneficiary would be performing rather than managing the marketing function within the company.

On appeal, counsel for the petitioner contends that the beneficiary is eligible for L1A classification. Specifically, counsel claims that the beneficiary actually supervises more employees, including managers, than previously described. The petitioner submits a revised organizational chart of the U.S. company which places the two business development managers, who were initially depicted as being at the same level of management as the beneficiary in the previous organizational chart, under the beneficiary's direct supervision. In a letter dated February 3, 2004 submitted on appeal, the petitioner claims that the revised organizational chart correctly represents the structure of the company as of September 2003 and that the previous organizational chart reflected a planned development of the company that actually never took place. The petitioner further claims that the two business development managers have always reported to the beneficiary. Accordingly, counsel claims, the beneficiary does supervise the work of other supervisory, professional, or managerial employees within the organization, and there are qualified employees to relieve the beneficiary from performing non-qualifying duties. Counsel and the petitioner also assert that the \$800,000 figure stated in the initial supporting letter represents only the sales commission the U.S. company received from headquarters, and that the company's annual gross sales figure is actually greater than \$9 million. Counsel contends that the greater volume in gross sales indicates that the U.S. company is an organization with such complexity that a manager is required to manage the essential function of marketing for the company.

Upon review, the record is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. 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 must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

The AAO does not find persuasive petitioner's assertion on appeal that the beneficiary would be primarily employed in a managerial capacity because he actually supervises more staff, including managerial employees, than was described in the petition and supporting documentation. The organizational chart dated September 5, 2003 submitted with the initial petition clearly indicates that the beneficiary supervises two employees in "customer service" and "quoting/inside sales." In its December 3, 2003 response to the director's NOID, the petitioner confirmed that the beneficiary supervises only the two afore-mentioned non-managerial employees and listed the experience and responsibilities of only those two employees. Prior to the director's decision, no mention was made of the two business development managers being under the beneficiary's supervision, as the petitioner now claims on appeal. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary merits classification as a managerial or executive position at the time the petition was filed. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm.

1998). Thus, in this instance, the beneficiary's eligibility for the benefit sought will be determined based upon his role within the company at the time the petition was filed, as described in the initial petition and the petitioner's response to the director's NOID. The petitioner's revised version of the beneficiary's role within the company offered on appeal will not be considered.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. Here, the record does not establish that the beneficiary's subordinate staff is composed of supervisory, professional, or managerial employees.

In 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). In the instant case, the petitioner has not provided any information that would establish that a baccalaureate degree is actually necessary to perform the work of either of the beneficiary's subordinate employees in "customer service" and "quoting/inside sales," such that they could be considered professional employees, nor has the petitioner shown that these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Further, as noted earlier, the petitioner's revision on appeal of the role of the beneficiary to include supervision of the two business development managers shall not be taken into consideration. Even if that new version of the beneficiary's role is taken into account, the petitioner has provided no information whatsoever regarding the job responsibilities and qualification requirements of the business development managers, such that it could be determined whether these employees could be considered profession employees or managers other than in title only. In light of the foregoing, the AAO concludes that the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO also does not find persuasive the petitioner's claim that as the marketing manager, the beneficiary manages an "essential function" 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 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(1)(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. 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. *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, the record does not support the conclusion that the beneficiary manages an essential function.

In the initial petition, the petitioner describes the beneficiary as "manag[ing] the marketing department." However, according to the petitioner, the beneficiary's responsibilities include "formulating marketing strategy and sales plan based on company's policy," "conduct[ing] marketing survey, trend analysis, product promotion, advertisement and exhibition," "review[ing] and analyze goals and sales, interact with deputy general manager, sales and technical supporters," and "acting as a liaison between customers and the plants, to inform the company of the customer's feedback and oversee the after sales service." Even though the petitioner claims that the beneficiary manages the petitioner's marketing department, it does not appear that the beneficiary's subordinate employees actually perform the marketing functions described. Of the beneficiary's two subordinates, one is described as "responsible for all order placement, tracking, systems entry and customer interaction [and p]rovides weekly reports to [the beneficiary] for bookings and shipments," while the other "handles all incoming quotes." Thus, it is reasonable to conclude that the beneficiary himself is performing the marketing activities described and does not actually manage the marketing function as claimed by the petitioner. Further, the petitioner has failed to establish the proportion of the beneficiary's daily duties attributable to performing the marketing tasks as opposed to managing the marketing function. As previously noted, 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. *Id.*

Finally, the petitioner contends that the fact that the U.S. company has a gross sales figure of \$9 million for the year 2003 indicates that the company is an organization of such complexity that a manager is required to manage the company's "essential function" of marketing. Given the insufficiency of evidence regarding the company's structure and the beneficiary's duties, as discussed above, the gross sales figure alone fails to demonstrate the complexity of the organization or a corresponding need for a function manager to manage the marketing function.

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3). Accordingly, the appeal will be dismissed.

Beyond the director's decision, The AAO finds that the petitioner has not provided sufficient evidence to establish that a qualifying relationship continues to exist between the U.S. and foreign entities. In the initial petition, the petitioner indicated that the U.S. entity and the foreign entity are affiliates. 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 (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.

* * *

(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 regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 597; *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.

According to the petitioner, the U.S. company is 100% owned by Oriental Print Circuits Ltd. (OPCL); the foreign company is a joint venture in which Hong Kong MICA-AVA China Ltd. (MICA-AVA) has a 70% interest; and OPCL and MICA-AVA are both 99.99% owned by Meadville Limited (Meadville). The petitioner provided copies of the stock ledger and stock certificates number 1 and 2 of the U.S. company, showing that OPCL owns a total of 300,000 common shares, representing all of the issued and outstanding shares, of the U.S. company. The record also contains a copy of the December 1999 supplementary articles of the foreign company and a document entitled a Stock Equity Confirmation dated May 24, 2000 indicating that the foreign company is 70% held by MICA-AVA. With respect to OPLC, the record contains copies of the company's share certificates number 14, 17, 18 and 19, showing Meadville to be the registered holder of 86,825, 385,000, 18,975 and 9,199 shares of OPLC, respectively. With respect to MICA-AVA, the record contains copies of the company's share certificates number 3 and 5 showing Meadville to be the registered

holder of 39,000 and 38,999 shares of MICA-AVA, respectively. No other documentation has been submitted relating to the ownership interest of Meadville in OPLC or MICA-AVA.

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.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents with respect to Meadville's ownership interest in OPCL and MICA-AVA, CIS is unable to confirm the chain of corporate ownership and control as described by the petitioner and therefore cannot conclude that a qualifying relationship between the U.S. and foreign entities continues to exist as claimed. For this additional reason, the petition will be denied.

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 she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.