U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: WAC 03 051 54718 Office: CALIFORNIA SERVICE CENTER Date: AUG 19 2004

IN RE: Petitioner: [redacted]
Beneficiar

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 employ the beneficiary as president of its new office in the capacity of 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 and claims to be a real estate consultant and management company. The petition indicates that the petitioner is a subsidiary of Shenzhen Cheng Liang Heng Real Estate Broker Co., Ltd., located in China. The petitioner seeks to employ the beneficiary for an initial period of two years. The director determined that the petitioner was not sufficiently capitalized to commence doing business in the United States, and that the beneficiary was otherwise ineligible for the classification sought.

On appeal, counsel disputes the director's findings and asserts that the director's application of the relevant statute was incorrect.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

The regulations at 8 C.F.R. § 214.2(l)(3)(v) state that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

A) Sufficient physical premises to house the new office have been secured;

B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

At issue in this proceeding is whether a qualifying relationship exists between the U.S. petitioner and a foreign entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

> *Branch* means an operation division or office of the same organization housed in a different location.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

> *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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

> *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.

In support of the petition counsel submitted a statement claiming that the petitioner is wholly owned by the foreign company. Specifically, counsel stated that of the foreign entity owned all 1,000 of the issued shares of the petitioner's stock. A stock certificate reflecting the claimed ownership was submitted in support of the petitioner's claim.

The record reflects that on December 13, 2002 the director issued a request for additional evidence. The petitioner was specifically asked to submit the original wire transfers from the parent company to establish that the parent company actually paid for its ownership of the petitioning entity's stock.

The petitioner responded with a statement from counsel explaining that the foreign entity could not transfer money directly from China to purchase the petitioner's stock because of China's strict policies about transferring money out of the country. Counsel further explained that the foreign entity entrusted him with the money, which he then "hand-carr[ied]" out of China and transferred from Taiwan to California. The petitioner also submitted the minutes from its meeting, dated November 8, 2002, indicating that it issued 1,000 shares of its stock, which was purchased by the foreign entity.

The director found that the petitioner had failed to show that it is currently conducting business in the United States. As properly pointed out by counsel on appeal, the petitioner seeks to classify the beneficiary as a manager or executive of a new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). Contrary to the director's comment, there is no regulation that requires the petitioner to submit evidence to establish that it is doing business in the United States prior to being granted permission for the beneficiary's entry to the United States to actually open the new office. *See* 8 C.F.R. § 214.2(l)(3)(v). As such, the director's erroneous comment, implying an additional burden on the petitioner, will be withdrawn.

The director also questioned the foreign entity's ability to continue doing business, basing his speculation on the determination that the petitioner did not submit sufficient evidence to establish that it will support an

executive or managerial position within one year of approval of the petition. While the petitioner must establish that the foreign entity will continue doing business and that the U.S. entity would support a managerial or executive position within one year of the petition's approval, there is no basis for the director's assumption that a petitioner that fails to establish that the foreign company is doing business is unlikely to be able to support a managerial or executive position within one year of the petition's approval. The director's comment was inaccurate and is hereby withdrawn.

Nevertheless, the director was ultimately correct in concluding that the petitioner failed to establish the existence of a qualifying relationship with a foreign entity.

Although the record contains a stock certificate indicating that the foreign entity owns all of the petitioner's issued stock, there are no corresponding bank documents or wire transfers to suggest that the foreign entity actually contributed the funds for the stock purchase.

On appeal, counsel repeats his assertions about China's stringent policy regarding money transfers and asserts that the foreign entity actually invested more than just the funds used to purchase the petitioner's issued stock. Counsel claims that the foreign entity contributed over $2,500 for the first six months of the petitioner's rent, as well as consulting and legal fees and other fees associated with setting up a new business. Counsel has not, however, demonstrated the financial ability of the foreign company to commence operations in the United States. For this reason, this petition may not be approved. In addition, counsel failed to submit any evidence to support his statements regarding China's money transfer policies. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of 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).

On review, there is no evidence to demonstrate that the foreign entity actually funded its ownership of the petitioner's stock or that it provided any money for the petitioner's start-up operation, as claimed. As such, the AAO cannot conclude that a qualifying relationship exists between the U.S. petitioner and the beneficiary's foreign employer. For this additional reason, the beneficiary is ineligible for L-1 visa classification as an intracompany transferee under section 101(a)(15)(L) of the Immigration and Nationality Act.

Beyond the decision of the director, the petitioner has not provided sufficient evidence to establish that the beneficiary has been employed abroad in a qualifying managerial or executive capacity, or that she would be employed in the United States in that same capacity. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B) defining managerial capacity and executive capacity, respectively. 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). In the instant case, the description of the beneficiary's duties abroad suggest that she was performing several of the foreign entity's essential functions. It is noted that 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 record lacks a detailed description of the beneficiary's proposed duties in the U.S. It is noted that 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). As such, due to the additional grounds discussed in this paragraph, this petition cannot 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.

ORDER: The appeal is dismissed.