U.S. Department of Homeland Security

Citizenship and Immigration Services

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

FEB 03 2004

File: EAC 01 200 57619 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
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 claims to be in the import and distribution business. It seeks to employ the beneficiary temporarily in the United States as the president of its new office. The director determined that the petitioner had failed to establish that: (1) a qualifying relationship existed between the U.S. and foreign entities; (2) the foreign entity is presently engaged in the regular, systematic, and continuous provision of goods and/or services; (3) the beneficiary had been employed in a managerial or executive capacity for one year in the three years preceding the filing of the petition; and (4) the U.S. entity, within one year of the approval of the petition, will support an executive or managerial position.

On appeal, counsel disagrees with the director's decision and submits evidence to support his assertions.

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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the Unite States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity

that is managerial, executive or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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.

The regulations at 8 C.F.R. § 214.2(l)(3) state that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

According to the evidence contained in the record, the petitioner claims to be a subsidiary of Hwashin Distribution Company of Korea. The petitioner was incorporated in 2001 and claims to be in the import and distribution business. The petitioner declares four employees. The petitioner seeks the beneficiary's services as its president for the new office, for a period of one year, at an annual salary of $48,000.

The first issue in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

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.

In pertinent part, the regulations define "parent," "branch," "subsidiary," and "affiliate" as:

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

* * *

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

* * *

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.

* * *

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.

8 C.F.R. §§ 214.2(l)(1)(ii)(I), (J), (K), and (L).

The petitioner submitted as evidence a copy of the translated version of the foreign entity's Articles of Incorporation. The articles of incorporation call for the issuance of 20,000 shares of stock at the time of incorporation, at a par value of 5000 won each. The articles also provide for payment of shares in cash; transfer of shares by delivery of share certificates signed legitimately by the seller; and re-issuance of share certificates. The Articles of Incorporation for the foreign entity also lists names and addresses of seven promoters of the organization. The beneficiary's name is not listed as a promoter.

The petitioner submitted a single page document identified as the Certificate of Incorporation for the U.S. entity. A pertinent portion of this article of incorporation reads as follows:

> 3. The aggregate number of shares which the corporation shall have the authority to issue is one thousand (1,000), all of which are to be common shares without par value.

In a letter of support signed by the foreign entity's Chairman and President, it is noted that the beneficiary owns ten (10) percent of the issued and outstanding shares of that company's stock.

The director denied the petition after determining that the record did not establish that a qualifying relationship between the U.S. and foreign entities existed. The director stated that the petitioner failed to submit requested information. The director went on to state that the evidence presented did not establish who owned what stock in the U.S. or foreign entities. The director concluded by stating that there had been no independent documentary evidence submitted to establish ownership and control and, therefore, the petitioner failed to establish that a qualifying relationship existed between the U.S. and foreign entities.

On appeal, counsel disagrees with the director's decision, and submits a brief and documentary evidence that had been previously submitted by the petitioner, in support of counsel's contention. Counsel asserts that the evidence submitted by the petitioner is sufficient to establish a qualifying relationship

between the U.S. and foreign entities. Counsel further contends that the letter of support submitted by the petitioner clearly articulates that the beneficiary owns ten percent of shares of stock issued by the foreign entity and details the ownership of the other ninety percent of shares. Counsel states that in Korea, companies do not issue formal stock or share certificates. Counsel further states that ownership of company shares is demonstrated in the articles of incorporation and any certified amendments. Finally, counsel contends that the foreign entity submitted a letter into evidence demonstrating the foreign entity's complete ownership of the U.S. entity, thus establishing that the U.S. entity is a wholly-owned subsidiary of the foreign entity.

Counsel's assertions are not persuasive. There has been no evidence submitted to establish ownership and control over the U.S. entity. Therefore, Citizenship and Immigration Services (CIS) cannot determine this element of eligibility. Simply 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 one page copy of the U.S. Article of Incorporation does not show how stocks in the company have been distributed. There is no evidence to substantiate payment for the U.S. entity stock certificates. In the instant case, assertions alone are not sufficient to substantiate ownership and control of the U.S. entity. Contrary to counsel's contentions, primary evidence in the form of stock certificates, stock ledgers, minutes of stockholder meetings, notice of stock transactions, and other annual reports is what is needed to determine the level of ownership and control one entity has over another. In the instant case, the petitioner has failed to submit sufficient evidence to establish that shares of stocks have been issued by the U.S. entity or that the entity is owned and controlled by the foreign entity.

Furthermore, there has been no evidence submitted to establish stock distribution within the foreign entity, or that the foreign entity owns and controls management of the U.S. entity. Counsel contends that companies in Korea, including the foreign entity, do not issue formal stock or share certificates. Counsel further asserts that stock ownership in the foreign entity is demonstrated in the articles of incorporation and any amendments thereto. These contentions are contrary to the articles of incorporation, which read in pertinent part:

Article 11.
Transfer of Shares and Alternation of Entries

1. The transfer of shares of the Company shall be effected by deliver of share certificate signed legitimately by the seller.
2. Any shareholder desiring alteration of entries in the Register of Shareholders shall submit to the Company an application therefor in the form prescribed by the Company, together with the share certificate.

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). Although the foreign entity's articles of incorporation state that stock certificates are issued to shareholders, the petitioner has not provided copies of any such documents. The petitioner has not submitted documentary evidence to substantiate the contention that the beneficiary owns 10 percent of the foreign entity's stock. There has been no evidence submitted to show, as is promulgated in the foreign entity's articles of incorporation, that any cash payments were made in exchange for shares of stock in the company. Contrary to counsel's assertions, there has been no evidence presented to establish who owns what stock in the foreign company. The petitioner failed to submit evidence requested by the director in the notice for additional evidence. In addition, the petitioner failed to submit sufficient evidence to overcome the issues initially raised by the director. Furthermore, 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." Accordingly, the director's decision to deny the petition, in part, on the lack of evidence to show a qualifying relationship between the two entities shall not be disturbed.

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 United States and foreign entities for purposes of a nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. 362 (Comm. 1986);

Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International,* 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant visa proceedings). 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, supra.* Without full disclosure of all relevant documents, including: stock certificates corporate stock ledgers, stock certificate registry, corporate by-laws, stock distribution agreements, and minutes of all relevant annual shareholder meetings, CIS is unable to determine the elements of ownership and control. Upon review, the petitioner has not submitted sufficient evidence to establish that a qualifying relationship exists between the U.S. and foreign entities.

The second issue in this proceeding is whether the foreign entity has been and is presently doing business as defined in the regulations.

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

> *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner submitted as evidence a Certificate of Business Entity Registration for the foreign company, dated November 8, 2000; a Certificate of Chain Business, dated August 19, 1988; and a Foreign Liquor License, dated 1999.

In a notice letter, dated June 13, 2001, the service director noted that the petitioner failed to submit the required initial evidence, and requested that it respond to the following concerning the foreign entity's business practices:

> In addition, submit additional evidence that the foreign organization has been engaged and is presently engaged in the regular, systematic and continuous provision of goods or services. Describe in detail the type of business that is conducted by the foreign

> entity. Be specific and submit documentation that corroborates your explanation. Include the type and location of established and prospective customers/clients, the services that are provided by the foreign organization and the products and/or commodities that are sold. Submit a copy of the most recent business tax return filed by the foreign entity, copies of recent payroll documents, and other independent evidence to establish the business activities of the foreign entity.

In response to the director's request for additional evidence counsel states that evidence submitted to include company brochures, contracts, agreements and other documentation is sufficient to establish that the foreign entity is currently engaged in the continuous provision of goods or services.

The director denied the petition after determining that the record did not establish that the foreign entity had been or was doing business as defined by the regulations.

On appeal, the petitioner disagrees with the director's decision and submits a brief and previously submitted evidence to establish that the foreign entity has been and is doing business. Counsel contends that the above listed documentary evidence demonstrates a regular, systematic and continuous provision of goods from 1988 to 2000. Counsel goes on to assert that evidence submitted by the petitioner establishes the financial viability and business activities of the foreign entity. Counsel further lists a Merchandising Agreement with El Kart Corporation and the Monthly Payroll Chart for fiscal year 2000, and Hwashin's latest advertisement of products for its 21st Century expansion as evidence of the foreign entity's viability and business activities.

In review, the evidence submitted is insufficient to establish that the foreign entity has been or is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. The petitioner's compliance with inquires made by the service director in the request for additional evidence is marginal, at best. The petitioner was given ample opportunity to produce the required initial evidence and other business records to substantiate its claim of doing business as a viable entity abroad. Neither the agreements submitted by petitioner nor the foreign entity's advertisement

is dated. The conclusions made by counsel were not supported by documentary evidence. Simply 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 failed to produce relevant documents such as corporate tax returns, invoices, bank statements, and other recently dated documentation attesting to the foreign entity's engagement in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. The petitioner submitted an undated merchandising agreement, monthly payroll charts, and the foreign entity's products advertisement, as evidence. The record as presently constitute is not persuasive in demonstrating that the foreign entity, at the time of filing the petition, was doing business abroad pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(G)(2).

The third issue in this proceeding is whether the petitioner has established that the beneficiary has been employed for one continuous year within three years preceding the filing of the visa petition, and that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily—
>
> (i) Manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) If another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well

as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily—
>
> (i) Directs the management of the organization or a major component or function of the organization;
>
> (ii) Establishes the goals and policies of the organization, component, or function;
>
> (iii) Exercises wide latitude in discretionary decision-making; and
>
> (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner described the beneficiary's current job duties as follows:

> [The beneficiary's] specific duties as the Vice President/Executive Director of Hwashin Distribution Company include:

- [O]verseeing the day to day operations of the Planning & Overseas [sic] Business Division (40 hours a week).
- Management of all operational activities which include but are not limited to Domestic Business and USA Region (40 hours a week).
- Conducting personnel selection, hiring criteria and non-executive promotions with approved salary structures and personnel policies (20 hours a week).
- Defining the operational procedures and guidelines (20 hours a week).

The petitioner described the beneficiary's proposed job duties as follows:

> President - The President has the ultimate responsibility for and authority over he [sic] day to day operations of the company's business, including but not limited to the following matters;
>
> -Management of all operational activities.
> -Personnel selection, hiring criteria and non-executive promotions with approved salary structures and personnel policies.
> -Definition of operating procedures and guidelines.

The beneficiary is described in an organizational chart of the foreign entity as: "responsible for the planning and overseas division, and management of all domestic and US regions." The beneficiary's proposed subordinates are listed as marketing director, operations manager, distribution manager, and consultant. The beneficiary's current subordinates are listed as domestic business manager, and USA regional manager.

In a letter signed by the chairman and president of the foreign entity, it is stated that the beneficiary has been registered as an executive director of Hwashin Distribution Company from January 15, 2000. An annual tax withholding receipt demonstrates that the beneficiary's employment with the foreign entity covers a period from August 1, 2000 to December 31, 2000. In comparison, an annual tax withholding receipt prepared for the same foreign entity demonstrates the CEO's employment covering the entire tax period from January 1, 2000 to December 31, 2000.

The director determined that the evidence submitted was not sufficient to establish that the beneficiary had been employed for one continuous year abroad, or that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The record does not establish that the beneficiary has been employed abroad in a primarily managerial or executive capacity for at least one year within the three years preceding the submission of the petition. Counsel contends that the beneficiary began employment with the foreign entity on January 15, 2000. On the other hand, annual tax withholding receipts demonstrate that the beneficiary has been employed by the foreign entity for a period covering August 1, 2000 to December 31, 2000. There is also evidence demonstrating that the beneficiary entered the United States in a B1 visitor visa status on March 29, 2001. Collectively, the evidence establishes that the beneficiary has been employed by the foreign entity for only eight months, not one year, as required by the regulations. Furthermore, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the petitioner has failed to submit sufficient evidence to establish that the beneficiary's foreign employment was in a managerial or executive capacity. The information provided by the petitioner describes the beneficiary's past duties only in broad and general terms. Duties described as: overseeing the day-to-day operations of the foreign entity; managing all operational activities; conducting personnel selection; and defining the operational procedures and guidelines are without sufficient detail in which to make a determination that such duties are managerial or executive in nature. The vague position description is insufficient to establish that the beneficiary's past job duties are managerial or executive in nature. Furthermore, the petitioner has not provided persuasive evidence to establish that the beneficiary has been managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. In the instant case, the evidence shows that the beneficiary and the CEO are the only employees of the foreign entity. The beneficiary's title alone, is not sufficient to establish that the actual duties

performed are managerial or executive. There is no evidence to demonstrate that the beneficiary performs executive duties for the foreign entity.

Neither does the record support a finding that the beneficiary's proposed job duties with the U.S. entity will be in a managerial or executive capacity. There is no evidence to show that the beneficiary will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. The petitioner has failed to submit a business plan, which explains how many employees the U.S. entity plans to hire; how soon they will be hired; what their titles will be; or how their positions will be directed or managed by the beneficiary.

Furthermore, the petitioner's evidence is not sufficient in establishing that the beneficiary will be directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher level executives. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Based upon the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

The fourth issue in this proceeding is whether the U.S. entity, within one year of the approval of the petition, will support an executive or managerial position.

The evidence submitted by the petitioner failed to establish that the new entity, within one year of the approval of the petition, will support a managerial or executive position. The record does not demonstrate that the U.S. entity contains the organizational complexity or financial backing to support the proposed managerial or executive staff position. The petitioner has failed to submit sufficient documentary evidence to establish compliance with the regulatory requirements for a "new office" pursuant to 8 C.F.R. § 214.2(1)(3)(v). The petitioner failed to adequately respond to the director's request for additional evidence. There has been no evidence presented that details the nature of the U.S. entity's business. A letter, dated May 1, 2001, written by the U.S. company president contains a size estimate for the office

of seven hundred fifty (750) square feet. However, there is no indication that this approximation is sufficient to accommodate the petitioner's business and expansion needs. Although the record reflects wire transfers to the U.S. entity, there is no indication of their origins or the purpose for which the funds were sent. In addition, the petitioner has failed to present corresponding documents from the foreign entity to corroborate counsel's contention that the funding came from the foreign entity. There has been no business plan submitted which describes in detail, the proposed establishment and growth plans for the U.S. entity. Although the letter of support written by the chairman and president of the foreign entity mentions plans for the U.S. entity, it fails to provide information regarding what the plans actually entail. Contrary to counsel's assertions, a forecasted financial report does not suffice to explain how the new office plans to organize, finance, build and maintain its business in the United States.

In summary, the petitioner has failed: to establish a qualifying relationship between the U.S. and foreign entities; to show that the foreign entity has been and will qualify as doing business; to demonstrate that the beneficiary has been employed by the foreign entity for one continuous year in the three years preceding the filing of the petition; to demonstrate by documentary evidence that the beneficiary has been or will be employed primarily in a managerial or executive capacity; and to provide sufficient evidence to demonstrate that the U.S. entity, within one year of the approval of the petition, will support an executive or managerial position.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.