

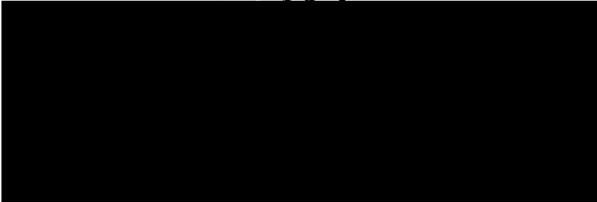
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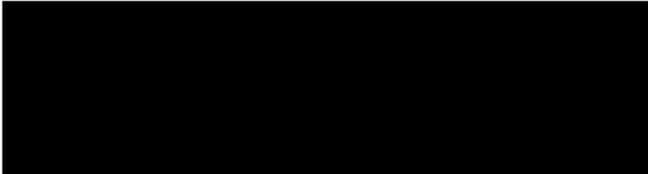
File: WAC 04 132 52538 Office: CALIFORNIA SERVICE CENTER Date: **NOV 14 2007**

IN RE: Petitioner:  
Beneficiary:



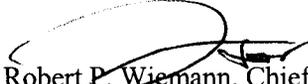
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, 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 visa petition seeking to extend the employment of its director 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 under the laws of the State of Nevada and is allegedly an importer and distributor of handicrafts, jewelry, and oil paintings.

The director denied the petition concluding that the petitioner did not establish (1) that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner has a qualifying relationship with the foreign employer.

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 to the petitioner asserts that the beneficiary's duties are primarily those of an executive or a function manager. Counsel further asserts that the petitioner has established that it has a qualifying relationship as a subsidiary of the foreign employer.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The first issue in 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.

Although the petitioner states in the initial petition that the beneficiary will be primarily engaged in performing executive duties under section 101(a)(44)(B) of the Act, counsel implies on appeal that the beneficiary will also be employed in a managerial capacity under section 101(a)(44)(A) of the Act. Given the lack of clarity, the AAO will assume that the petitioner is asserting that the beneficiary will be employed as a manager *or* an executive and will consider both classifications.

The petitioner described the beneficiary's job duties in a letter dated April 6, 2004 as follows:

1. Coordinating the methods and procedures of import and trade for sale and distribution of handicrafts from India
2. Develops and implements policies of business negotiations, marketing, and sales techniques
3. Exercises authority to hire, fire, train, & delegate responsibilities to staff, or temporary personnel
4. Establish, negotiate, and administrate corporate contracts governing any aspect of the operation, function or products of [the petitioner]
5. Develop and implement business policies and procedures for staff and temporary personnel
6. Provide strategic product plans to ensure that the business and strategic policies are effectively incorporated into business activities
7. Represent the corporate attitudes with prospective international buyers and develop new strategies of marketing to corporate consumers (obviously requiring the formal knowledge and professionalism of an executive as opposed to a front-line supervisor)
8. Function autonomously without direct control from the parent company

The petitioner also indicated that "one of the primary tasks" of the beneficiary is using his knowledge and skill to sell and market the petitioner's handicrafts, jewelry, and paintings.

Furthermore, the petitioner indicated in the letter dated April 6, 2004 that it employs one person in addition to the beneficiary. In support of this assertion, the petitioner submitted "payroll summaries" beginning September 16, 2003 and ending December 31, 2003 and 2003 Forms W-2. These documents indicated that the petitioner hired the beneficiary's single subordinate employee in September 2003 and paid him a total of \$2,431.00 in wages in 2003.

On August 5, 2004 the director requested additional evidence. The director requested, *inter alia*, an organizational chart, descriptions of subordinate employees, and wage reports.

In response, the petitioner submitted an organizational chart in which the beneficiary is portrayed as supervising two employees and a "selling agent." The two employees are described as "office assistants" who are "responsible for day-to-day sales, customer service and other routine business transactions involved in operating the business." The "selling agent" is allegedly paid on a commission basis and sells the petitioner's products.

Despite the claims made in the organizational chart and associated job descriptions, the petitioner's Forms 941, Employer's Quarterly Federal Tax Return, for the first two quarters of 2004 confirm that the petitioner only employed two people during this six-month time period, which includes the date on which the instant petition was filed. The petitioner offers no explanation for this inconsistency with the organizational chart. Moreover, none of the three individuals identified as subordinate workers in the organizational chart is the individual identified in the Form W-2 and "payroll summaries" submitted with the initial petition. The petitioner does not explain what happened to this employee or when, exactly, it hired any of the three workers identified in the organizational chart.

On November 4, 2004, the director denied the petition. The director concluded in part that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial or executive capacity.

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

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

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis. For example, the petitioner states that the beneficiary will develop and implement policies; provide "strategic product plans;" negotiate contracts; represent "the corporate attitudes with prospective international buyers;" and develop "new strategies of marketing." However, the petitioner does not specifically define the petitioner's policies, plans, or strategies or explain what, exactly, the beneficiary will do in negotiating contracts or in representing the petitioner. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes lofty duties does not establish that the beneficiary will actually perform managerial duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, it appears that the beneficiary will be primarily performing non-qualifying administrative or operational tasks, which do not rise to the level of being managerial or executive in nature. For example, the petitioner states that the beneficiary will engage in contracting and will develop "marketing strategies." Furthermore, the petitioner states that "one of the primary tasks" of the beneficiary is using his knowledge and skill to sell and market the petitioner's handicrafts, jewelry, and paintings. However, duties related to sales, marketing, and contracting constitute administrative or operational tasks when the tasks inherent to these duties are performed by the beneficiary. As the organizational chart and job descriptions for the subordinate employees fail to identify any employees or independent contractors who will relieve the beneficiary of the need to perform the non-qualifying tasks inherent to these many duties and to the management of the business in general, it must be concluded that he is performing these tasks. Not only are the subordinate employees not described as performing these non-qualifying tasks for the beneficiary, the very existence of these employees has not been established given, as explained above, that the wage reports are fundamentally inconsistent with the organizational chart. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19

I&N Dec. 582, 591-92 (BIA 1988). As the petitioner has not established how much time the beneficiary will devote to non-qualifying tasks, it cannot be confirmed that he will be "primarily" employed as a manager. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As explained in the organizational chart and job descriptions for the subordinate staff members, the beneficiary purports to supervise a staff of three employees. However, the petitioner has not established that these employees are primarily engaged in performing supervisory or managerial duties. To the contrary, it appears that these vaguely described employees are performing the tasks necessary to produce a product or to provide a service, e.g., sales and customer service tasks. Regardless, as explained above, the petitioner's wage reports for the first and second quarters of 2004 clearly indicate that the petitioner employed two people, including the beneficiary, during this time frame even though the organizational chart claims that the petitioner employed four people. In view of this serious, unexplained inconsistency, it has not been established that the petitioner had any subordinate employees at the time the instant petition was filed. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Thus, the beneficiary would appear to be primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, the petitioner has not established that the beneficiary will manage professional employees.<sup>1</sup> Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.<sup>2</sup>

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<sup>1</sup>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).

<sup>2</sup>While the petitioner has alluded that the beneficiary will manage an essential function of the organization, the record does not support this position. 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. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an

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

It is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g., Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* As explained above, the record in this matter contains serious inconsistencies regarding the staffing of the petitioner. While the petitioner claims to have employed four people, the wage reports only confirm the petitioner's employment of two people. Given this inconsistency, it is unclear which of the employees identified in the organizational

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

chart, if any, are actually employed by the petitioner and how, exactly, the beneficiary will be relieved of the need to perform non-qualifying tasks.

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

The second issue in the present matter is whether the petitioner has established that it has a qualifying relationship with the foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by:

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.

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business." A "subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner asserts that it is the subsidiary of the foreign employer. In support, the petitioner submitted a letter dated April 6, 2004 in which it explains that the beneficiary came to the United States on behalf of the foreign entity to set up the petitioner's current business in 2000. Apparently, in setting up the petitioner's business, the beneficiary rented space in his own name, made himself the sole stockholder, and held himself out as the owner of the petitioner. However, the petitioner explained in the above referenced letter that the petitioner's tax returns "now reflect [the petitioner] as the subsidiary owned 100% by [the foreign entity]" and that the stock certificates, originally issued to the beneficiary, have been voided and replaced by three stock certificates collectively issuing 100% of the petitioner's stock to the foreign entity. The petitioner submitted copies of these three new stock certificates: (1) Certificate #3 – 1,257 shares – October 22, 2003; (2) Certificate #4 – 1,000 shares – January 9, 2004; and (3) Certificate #5 – 1,000 shares – January 9, 2004.

On August 5, 2004, the director requested additional evidence. The director requested, *inter alia*, evidence that the foreign entity actually paid for the stock allegedly issued to it.

In response, the petitioner submitted a letter dated October 21, 2004. In this letter, the petitioner explains that the foreign entity sent the beneficiary to the United States in 1999 with \$5,000.00 in cash and traveler's checks to "promote the business." In May 2000, the petitioner opened a bank account apparently using the funds originally brought by the beneficiary from India and funds contributed by a third party who is no longer associated with the petitioner's business. In July 2000, the foreign entity allegedly sent "another \$8,000.00" via another third party. Part of this money was apparently deposited into the petitioner's account and partially used to pay back the funds contributed by the disassociated third party.

On November 4, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. Specifically, the director concluded that

the petitioner failed to establish that the foreign entity truly owns and controls the petitioner because it failed to establish that the foreign entity actually made an investment in the petitioner. The director also noted inconsistencies in the record regarding the issuance of shares in the petitioner.

On appeal, counsel argues that the director erred and that the record establishes that the foreign entity owns and controls the petitioner. Specifically, counsel asserts the beneficiary was always acting on behalf of the foreign entity in setting up the petitioner's business and that all indicia in the record of the beneficiary having an ownership interest in the petitioner were either errors, which have now been corrected, or were necessary to facilitate the establishment of the United States operation.

Upon review, counsel assertions are not persuasive.

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 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. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. *See* 8 C.F.R. § 214.2(l)(3)(viii). As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In this matter, the petitioner has not established that the foreign entity actually transferred funds to the petitioner in exchange for the stock issued to it in 2003 and 2004 and, thus, has not established that the foreign entity actually owns and controls the petitioner. As correctly noted by the director, the record is devoid of any evidence that the foreign entity actually paid for the stock issued to it. While the petitioner has submitted evidence that funds were invested in the United States operation when it was formed, these funds came from unrelated third parties and/or were directed to the beneficiary personally. 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)). Also, while counsel on appeal identifies other claimed transfers of funds by the foreign entity, counsel fails to submit any evidence corroborating his claims. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Overall, the record is not persuasive in establishing that the foreign entity truly owns and controls the petitioner. As indicated above, it was not until October 22, 2003, that any stock was issued to the foreign entity, and the record does not establish that the foreign entity contributed any money or other consideration in exchange for this stock. Not only did this stock transaction take place less than six months before the filing

