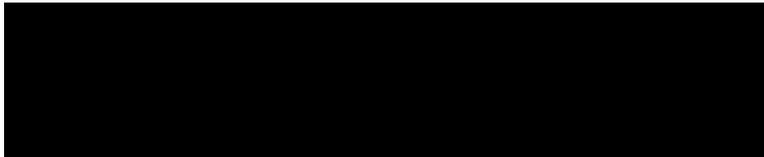




U.S. Citizenship  
and Immigration  
Services



D7

File: WAC 03 196 53306 Office: CALIFORNIA SERVICE CENTER Date: AUG 02 2005

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

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

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, Director  
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 general 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 high-tech communication services for online trading. The petitioner claims that it is the subsidiary of [REDACTED] located in Beijing, 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 for three more years.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary has been and will continue to be employed in the United States in a primarily managerial or executive capacity; and (2) the petitioner was doing business as required by the regulations.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the beneficiary was in fact a qualified manager and/or executive and that the petitioner was in fact doing business as defined by the regulations. Specifically, counsel asserts that the beneficiary's short stay in the United States, coupled with the youth of the petitioner's business, should be considered on appeal.

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 (I)(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.

The first issue in this 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 the initial petition, counsel submitted a letter from the foreign entity dated June 18, 2003 detailing the nature of the beneficiary's duties. Specifically, the petitioner claimed that the beneficiary's duties were as follows:

To plan and develop company policies and goals. To coordinate activities and operations of departments. To effect operational efficiency and economy. To manage promotion of products and services. To make decision on promotion, hiring and firing of employee[s]. To manage preparation of company budgets. To report progress of the U.S. subsidiary to parent company.

\* \* \*

Since the beneficiary reported [to] duty to the U.S. subsidiary, he demonstrated excellent job performance. Under his management, not only [did] the trading business [advance] rapidly, the U.S. subsidiary was even able to establish its restaurant business under the fictitious business name as Dragon Palace Buffet Restaurant. Our U.S. subsidiary maintains eight employees. Occasionally, we retain additional part-time employees to smooth out our workload when our business is at its peak.

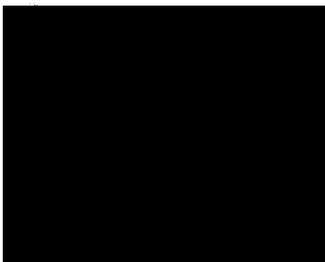
The petitioner also submitted a copy of its Form 941, Employer's Quarterly Federal Tax Return for the quarter ending March 31, 2003, as well as a copy of its internal payroll summary for April 2003 and May 2003. The quarterly return indicated that as of March 31, 2003 the petitioner employed the beneficiary, two salespersons, and a waiter. The April payroll summary indicated that the same employees worked for the petitioner during that period. Finally, the payroll summary for May 2003, when compared against the organizational chart provided for the U.S. entity, indicated that the petitioner hired four additional employees during this period: a cashier, two cooks, and a manager.

On June 27, 2003, the director requested additional evidence pertaining to the nature of the beneficiary's position and the petitioner's organization in the United States. Specifically, the director requested a brief description of the duties, educational background, annual salary, and immigration status for all of the petitioner's employees working under the beneficiary's supervision. In addition, a detailed description of the beneficiary's duties was requested, along with a breakdown of the percentage of time the beneficiary spent on each of the stated duties.

In a response dated July 15, 2003, the petitioner, through counsel, submitted a detailed response to all of the points raised by the director. With respect to the beneficiary's duties, the petitioner stated that his major responsibilities include:

- To direct and coordinate activities and operations of the U.S. subsidiary to obtain optimum efficiency and economy of operations and maximize profits.
- To plan and develop organization policies and goals and to implement goals through subordinates.
- To coordinate with sales personnel on the promotion of corporation products and services.
- To analyze corporation budgets to identify areas to allocate operating budget.
- To confer with employee[s] and to review activity, operation, and sales reports to determine if changes in the corporation operation are required.
- To hire; fire; and train employee[s] and to review and evaluate employee performances.
- To confer with the Board of Directors of the parent company on important corporation matters, and to make decisions.
- To present periodical report to the parent company of the progress of the U.S. subsidiary.

The petitioner further stated that the beneficiary spends 80% of his time managing the operation of the trading business, which was steadily growing, and devotes 20% of his time to the restaurant business by supervising the management of the restaurant manager at the physical restaurant premises. The response further clarified the employees of the petitioner and listed them as follows:



- Manager of the restaurant.
- Sales representative of the corporation.
- Sales representative of the corporation.
- Secretary of the corporation.
- Cashier of the restaurant.
- Waiter of the restaurant



- Waiter of the restaurant.<sup>1</sup>
- Cook of the restaurant.

A brief description of their duties was also included with the petitioner's response.

On July 31, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the evidence in the record was insufficient to warrant a finding that the beneficiary had been and would continue to be functioning in a capacity that was primarily managerial or executive. In addition to finding that the petitioner had failed to establish that the beneficiary's duties satisfied the regulatory definitions of managerial and executive capacity, the director found that the original petition, which substantiated the need for the beneficiary's services as general manager to oversee the petitioner's trading business, was now expanded to primarily encompass the petitioner's acquisition and operation of a restaurant business. Since the petitioner's main business operation was different than that originally named in the petition, the director was skeptical with regard to the petitioner's motivations. On appeal, counsel asserts that the director's conclusions were erroneous, and asserts that the petitioner's expansion into the restaurant business is not an appropriate ground for denial.

Upon review, counsel'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 burden is on the petitioner to specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

As previously indicated, a request for evidence was issued because the initial description of the beneficiary's duties was insufficient. The petitioner's response further clarified the beneficiary's duties and explained that the beneficiary would devote most of his time (80%) to the trading business. Although a more detailed description of the beneficiary's duties was provided in response to the request for evidence, the list of duties was still generalized and vague, and failed to accurately provide a breakdown in terms of the percentage of time he would devote to each duty.

Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. In this case, counsel alleges that the beneficiary is a manager by virtue of his position title and his responsibility to plan and organize the petitioner's policies and goals in addition to overseeing personnel. However, the stated duties identified in the record do not substantiate the claims of the petitioner and counsel

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<sup>1</sup> The AAO notes that on the organizational chart provided, [REDACTED] is identified as a cook, not a waiter. 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).

for two reasons. First, the petitioner fails to document what the percentages of time the beneficiary devotes to each stated duty, aside from his statement that 80% of his time is devoted to the trading business whereas 20% is devoted to the restaurant. However, the record clearly indicates through the statements of the petitioner and counsel that the trading business is not yet fully established and probably will not be fully operational for another one to two years. Yet, the petitioner claims that 80% of the beneficiary's time is devoted to the trading business. 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).

The AAO will reexamine this issue in more detail after first reviewing the actual duties of the beneficiary. 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). In this case, however, the updated statement of the beneficiary's duties in response to the request for evidence seems to merely paraphrase the regulatory definitions, and fails to indicate the exact nature of the beneficiary's daily tasks. Reciting the beneficiary's vague job responsibilities or broadly cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.* at 1108. Additionally, it appears that the beneficiary is directly responsible for generating the services of the business, since 80% of his time is devoted to the trading business which the petitioner confirms is not yet fully operational. The initial letter of support submitted with the petition, dated June 18, 2003, indicates that the beneficiary is personally involved in complex business transactions and contract negotiations, thereby indicating his direct involvement in the generation of the services of the trading company. 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 petitioner's counsel argues that the director erroneously based the denial on the fact that the petitioner's business has expanded into the restaurant industry. Counsel asserts that the trading business is a difficult business to commence and thus will require several years of time and effort before the business is profitable and secure. Counsel further asserts that the efforts of the beneficiary have allowed the petitioner to invest in the lucrative restaurant business while the trading business is gradually established, thus establishing the beneficiary's importance to the organization. The AAO disagrees.

The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). At the time of the initial petition's filing, as well as at the time of the petitioner's request for extension, the beneficiary's proposed position was that of general manager of the petitioner's *trading company*. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Although the petitioner alleges that 80% of the beneficiary's time is devoted to the trading business, it also claims that the beneficiary manages the newly-established restaurant and thus duly qualifies as a manager and/or executive.

The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Since by the petitioner's own admission, the trading company is not yet fully operational, the request to extend his stay in order to continue his role as the general manager of the trading company is inconsistent with the evidence submitted, which shows that the crux of the petitioner's recent business dealings have been focused on the restaurant. 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).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In this case, the petitioner was afforded a one-year period, from July 1, 2002 through July 1, 2003, to establish a trading company and support the beneficiary in the position of general manager of the trading company. By the petitioner's own admission, it has been confirmed that the trading company is still in the start-up phase, and the petitioner urges CIS to look alternatively to its acquisition of a restaurant one month prior to the petition's filing as a means of justifying the extension. This position is not persuasive. There is no provision in CIS regulations that allows for an extension of this one-year period. If the identified business (namely, the trading company) is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" as "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."

In this matter, the petitioner claims to be engaged in the handling of the overseas online trading business of the parent company. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business and specifically noted the absence of shipping invoices and transaction evidence pertaining to the overseas business.

With the initial petition, insufficient evidence of the petitioner's trading business was submitted. Consequently, in the request for evidence issued on June 27, 2003, the director requested additional information pertaining to the nature of the petitioner's trading business. The director specifically noted that the only documentation submitted thus far pertained to a recently acquired Chinese restaurant and not to the trading business identified in the petition. In the response filed on July 15, 2003, the petitioner submitted a detailed list and accompanying documentation which pertained solely to the restaurant business and failed to specifically address the trading business the petitioner claimed to be operating in the initial petition.

The director denied the petition on July 31, 2003 and specifically stated that the record failed to contain copies of the company's shipping invoices and transaction documentation, aside from a few documents from February and March of 2003. On appeal, counsel again submits copies of Bills of [REDACTED] from February 2003 and asserts that these documents suffice.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted an initial period of stay from July 1, 2002 to July 1, 2003 to open a new office. The petitioner claimed that it would be handling overseas online trading for the foreign entity.

Other than a few copies of bills of lading from February 2003 and March 2003, the record contains no documentation whatsoever pertaining to the year 2002, nor for the period of January 2003 and April 2003 through June 2003. Although the petitioner acquired a restaurant in May 2003, there is no evidence the petitioner could have regularly and systematically provided goods and services for the previous year through this newly-acquired business.

In the course of examining whether a petitioning company has been doing business as an overseas trading business, it is reasonable to expect that the company produce copies of documents that are required in the daily operation of the enterprise due to routine regulatory oversight. Upon the importation of goods into the United States, the Customs Form 7501, Entry Summary, serves to classify the goods under the Harmonized Tariff Schedules of the United States and to ascertain customs duties and taxes. The Customs Form 301, Customs Bond, serves to secure the payment of import duties and taxes upon entry of the goods into the United States. According to 19 C.F.R. § 144.12, the Customs Form 7501 shall show the value, classification, and rate of duty for the imported goods as approved by the port director at the time the entry summary is filed. The regulation at 19 C.F.R. § 144.13 states that the Customs Form 301 will be filed in the amount required by the port director to support the entry documentation. Although customs brokers or agents are frequently utilized in the import process, the ultimate consignee should have access to these forms since they are liable for all import duties and taxes. Any company that is doing business through the regular, systematic, and continuous provision of goods through international trade may reasonably be expected to submit copies of these forms to show that they are doing business as such a business. In this case, there are no copies of such forms, aside from those few documents from February and March 2003, to establish that the petitioner was regularly, systematically, and continuously providing goods as it claims.

Thus, the petitioner was not doing business during the relevant period as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that business may have been slow to start. However, the record is devoid of an explanation as to what the petitioner did during the most recent period, from July 1, 2002 through July 1, 2003, and a total of less than 10 invoices during this period is not enough to establish that the petitioner has been conducting a regular and continuous trading business during this time.

In the present matter, the evidence submitted at the time of filing confirmed that the petitioner had not been conducting business as required, and notably, the petition in this matter was filed nearly two years after the petitioner commenced operations. The petitioner's acquisition of the restaurant in May 2003 is insufficient to establish that it had conducted business during the previous year, specifically since there is no indication of

any similar action toward alternative business pursuits prior to this time. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. §214.2(l)(1)(ii)(G). Specifically, in addition to a copy of its shareholders agreement dated January 24, 2002, the petitioner only submitted a copy of stock certificates four through seven. There is no discussion of stock certificates one through three, thereby suggesting that three additional shareholders may in fact have ownership interests in the petitioner that have not been disclosed in this matter. 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 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*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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.