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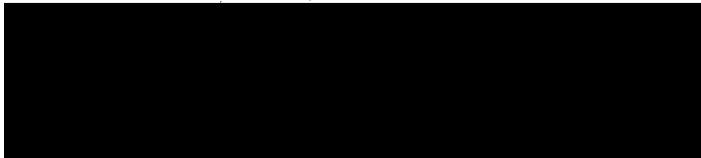
FILE: WAC 03 269 50201 Office: CALIFORNIA SERVICE CENTER Date: JUN 13 2005

IN RE: Petitioner:
Beneficiary:



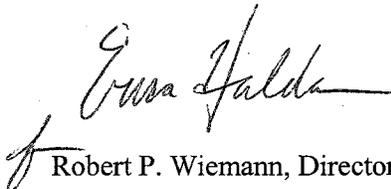
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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 nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED] claims to be a subsidiary of UT Freight Service Ltd., located in Taiwan. The U.S. entity was incorporated in the State of New York on March 12, 1979 and filed for a certificate of qualification in California on April 20, 1983. It is engaged in the air freight forwarding business. Accordingly, September 29, 2003, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for two years. The petitioner seeks to employ the beneficiary's services as a new employee and as the U.S. entity's general manager at a yearly salary of \$84,000. The petitioner claims to have sixteen employees.

On November 29, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director also determined that the petitioner failed to establish that a qualifying relationship existed between the U.S. company and foreign entity.

On appeal, the petitioner's counsel submits additional evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity and that a qualifying relationship exists between the petitioner and foreign entity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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 regulations at 8 C.F.R. § 214.2(l)(14)(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 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 this proceeding is whether a qualifying relationship exists between the petitioner and foreign entity. The regulation at 8 C.F.R. 214.2(I)(1)(ii) provides:

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

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

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

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

(K) *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.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and

foreign organization. See *Matter of Church Scientology International*, 19 I &N Dec. 593 (BIA 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

In the initial petition, the petitioner indicated that the foreign company owned 100 percent of the United States entity, thereby qualifying the petitioning company as a subsidiary of the overseas company. In support of this claim, the petitioner provided copies of its minutes of a special meeting of shareholders, stock ledger, and stock certificates, representing 200 shares of common stock issued to the claimed foreign parent, [REDACTED] on March 26, 1999. The petitioner also submitted a copy of its 2002 U.S. Corporation Income Tax Return indicating at line 5 of the Schedule K that at least 50 percent of its stock is owned by an individual or corporation and attached a statement indicating that the foreign entity owns 100 percent of the U.S. company's stock. The petitioner also submitted its 2002 California Form 100, California Corporation Franchise or Income Tax Return. On the return, the petitioner indicated that no single interest owned more than 50 percent of its stock. The petitioner's Form 1120 Schedule L shows the value of the company's common stock as \$50,000.

On October 9, 2003, the director issued a request for additional evidence. Specifically, the director requested evidence that the foreign entity actually paid for the U.S. entity's stock by submitting such evidence as original wire transfers, cancelled checks, and deposit receipts.

In response to the request for evidence, the petitioner claimed that the copies of the stock certificates, minutes of a special meeting of shareholders showing capitalization of \$50,000, and the stock ledger showed the qualifying relationship between the petitioner and foreign entity. The petitioner did not submit any additional evidence that would demonstrate that the foreign entity actually paid for the U.S. entity's stock.

On November 29, 2003, the director denied the petition because the petitioner failed to establish that the U.S. company and foreign entity had a qualifying relationship. Specifically, the director noted that Schedule K, line four on the petitioner's 2002 [REDACTED] Tax Return failed to show that the U.S. company was a subsidiary in an affiliated group or parent-subsidiary controlled group. The director also noted that absent copies of wire transfers and bank statements the petitioner failed to establish that the foreign entity controlled the U.S. company.

On appeal, the petitioner submits additional evidence that contradicts and confuses the original claim. In support of the appeal, counsel claims that the "2002 tax return, schedule K was incorrectly prepared by the [REDACTED] accountant." Counsel submits an affidavit from the accountant and an amended tax return prepared by the accountant that indicates that the company is an affiliated group or parent subsidiary controlled group. The company's accountant stated that he realized the information was incorrect. Counsel also submits an affirmation from a corporate attorney confirming the relationship between the claimed parent and petitioner. Finally, counsel claims, "[t]he

petitioner no longer possess any monetary records of transaction between the parent corporation in the purchase of stocks.”

On review, neither counsel’s assertions nor the evidence submitted is persuasive. The petitioner has not submitted sufficient independent objective evidence that would clarify the question of the corporation’s ownership. 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). Although the petitioner has submitted evidence such as stock certificates, the minutes of the meeting, and the stock ledger the petitioner has not submitted documentary evidence of the actual ownership and control of the U.S. company that led to the allegedly amended tax returns. The petitioner submitted a statement from its accountant who claimed, “I realized that the information on Schedule K is incorrect.” The critical mistake that led to the amended tax returns was not explained. 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)).

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I & N Dec. at 591-92. Merely asserting that the tax returns were incorrect and that “[t]he petitioner no longer possess[es] any monetary records of transaction between the parent corporation in the purchase of stocks,” does not qualify as independent and objective evidence. Again, 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. at 165. Furthermore, evidence that is created by the petitioner after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Associate Comm. 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

As noted by the director, the petitioner failed to submit evidence of the ownership and control of the U.S. company. Although the petitioner attempts to explain the errors in the original tax returns, it failed to clarify the issue of the ownership and control of the U.S. company. Accordingly, the AAO concludes that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign entities. For this reason, the petition may not be approved.

The second issue in this proceeding is whether 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.

On September 29, 2003, the petitioner submitted the Form I-129. On the Form I-129, the petitioner described the beneficiary's proposed U.S. duties as "Overseas Agencies Development, Administration, Financial, operation."

On October 9, 2003, the director requested additional evidence. Specifically, the director requested evidence of the current staffing levels in the United States. The director requested a copy of the U.S. company's organizational chart listing the U.S. entity's employees' titles, duties, and educational backgrounds. The director also requested a more detailed description of the beneficiary's proposed U.S. duties, Forms DE-6 Quarterly Wage Report for the last four quarters, Forms W-2 and W-3, and payroll summary.

In response, the petitioner submitted the U.S. entity's organizational chart, a description of the employees' duties and educational backgrounds, Forms DE-6 Quarterly Wage Report for 2002 only, W-3 Transmittal of Wage Statement, and 2002 W-2 forms. In addition, the petitioner submitted a November 4, 2003 company letter describing the beneficiary's proposed U.S. duties as:

[The beneficiary] will be responsible for overseeing the smooth operation of our ocean and air freight department including our administration and operation. His time spent will be 50% for operations and 50% expended in administration and other duties.

The letter further stated that the beneficiary will be supervising four subordinate employees, including an ocean operation department employee, an employee in the air operation department, an accounting department assistant, and an account manager.

On November 29, 2003, the director denied the petition. The director determined that the petitioner had not established that the beneficiary will be employed in a primarily managerial or executive capacity. The director found that "there was insufficient detail regarding the beneficiary's duties to be performed by the beneficiary, and the percentage of time devoted to these duties." The director also noted that the petitioner failed to provide the requested Forms DE-6, Quarterly Wage Reports for 2003, which would have confirmed the number of employees who would be working at the location under the beneficiary's supervision.

On appeal, counsel submits additional evidence to establish that the beneficiary will be employed in a primarily managerial or executive capacity. In a December 30, 2003 letter, the petitioner describes the beneficiary's duties as:

[The beneficiary] has been setting up the global network for [the petitioner's] Group and his job duties includes market research, sales promotion, negotiation of agreements and contracts. In his job capacity as the General Manager of our Los Angeles branch office, he will have full authority to establish the goals and policies of the organization. He will have full authority to fire and hire employees, exercise discretionary decision making decisions. [The beneficiary] will be directing all departments managers and employees within the organization.

In 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). On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity. The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will be performing on a day-to-day basis. For example, the petitioner described the beneficiary's duties as "overseeing the smooth operation of our ocean and air freight department" and "[h]is time spent will be 50% for operations and 50% expended in administration and other duties." Based upon the petitioner's limited description, it is unclear whether the beneficiary's duties are those of a manager or executive. Although the petitioner attempts to specify the amount of time the beneficiary will devote to his duties, it is unclear what amount of time is devoted to what specific 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).

Moreover, the petitioner described the beneficiary's proposed U.S. duties as "market research, sales promotion, negotiation of agreements and contracts." Since the beneficiary will actually promote sales and be responsible for marketing and negotiating, he will be performing tasks necessary to provide a service or product. 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).

Further, on appeal, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "establish[ing] the goals and policies of the organization" and "hav[ing] full authority to fire and hire employees, exercise discretionary decision making decisions." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Whether the beneficiary is a managerial 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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "market research," "sales promotion," and "negotiation of agreements and contracts," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing 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).

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

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. Although the petitioner stated in its response to the request

for evidence that several of the employees obtained college degrees, the possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant matter, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the work of an account assistant, who is among the beneficiary's subordinates.

Nor has the petitioner shown that any of the beneficiary's proposed subordinates supervise staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinates are supervisory, professional, or managerial as required by section 101(a)(44)(A0(ii) of the Act.

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO finds that the beneficiary has not been employed in a managerial or executive capacity abroad as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). As previously stated, to establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must submit evidence that within three years preceding the beneficiary's application for admission into the United States, the foreign organization employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. *Id.* On review, the petitioner submitted a limited and vague description of the beneficiary's foreign duties. For example, the petitioner described the beneficiary's foreign duties as "Agency Development, Administration, Financial." 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. at 165. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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 appeal will be dismissed.

ORDER: The appeal is dismissed.