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FILE: WAC 03 131 50512 Office: CALIFORNIA SERVICE CENTER Date: **JUN 14** 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)

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.

*for*   
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 appeal will be dismissed.

The petitioner, Strength Holding (U.S.A.), Inc. endeavors to classify the beneficiary as a nonimmigrant manager or executive 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 claims it is a wholly owned subsidiary of Shenzhen Strength Electric Co., located in China. It states that it is doing business as an International Trading company. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's chief executive officer and general manager. The petitioner was incorporated in the State of California on April 15, 1997 and claims to have four employees.

The director denied the petition based on the conclusion that the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. entity.

On appeal, the petitioner's counsel claims, "the Service Center director was in error in concluding that the beneficiary was neither an executive nor an upper level manager of the petitioning company."

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.

In relevant part, 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.

The issue in this proceeding is whether the beneficiary will be primarily performing managerial or executive duties for the United States entity. 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 March 19, 2003, the petitioner filed the Form I-129. The petitioner described the beneficiary’s proposed U.S. duties on the Form I-129 and in a March 7, 2003 letter as:

[D]irects policy and develops strategies to implement directives from corporate headquarters in China. Supervises the formulation of a purchase budget and implement procedures to make the import aspect of [the petitioner’s] operation more efficient. Supervises the satisfaction of tax and regulatory requirements with which the company must comply. She oversees the record keeping

pertaining to products purchased, cost, delivery, product quality and inventories. In this position, [the beneficiary] has the authority to obtain loans to meet cash requirements and to make decisions regarding disbursements. She discusses and resolves disputes that arise regarding financial matters of [the petitioner]. She has ultimate authority to make personnel decisions based on recommendations of those who work under her. Generally, [the beneficiary] is responsible for overseeing all operations in North America. Strong managerial skills are required for the position.

On May 8, 2003, the director requested additional evidence. Specifically, the director requested: 1) that the petitioner indicate the total number of employees it has working in the United States; 2) a more detailed description of the beneficiary's duties in the United States and the percentages of time spent in each of the listed duties; 3) a list of the employees that the beneficiary directs including their job titles and position descriptions; 4) copies of the DE-6 Quarterly Wage Reports for all employees for the last four quarters and Federal Form 941 Quarterly Wage Report; 5) a copy of the payroll summary, Forms W-2, and Forms W-3 showing wages paid to the employees; 6) specific evidence of the beneficiary's executive capacity; and, 7) a specific day-to-day description of the duties the beneficiary has performed over the last six months.

The petitioner's counsel responded to the request for additional evidence and submitted a July 30, 2003 letter further describing the beneficiary's U.S. duties as:

Generates new business and new business contacts, maintaining relationships with current customers, and devising long term strategies and goals necessary for the continued profitability of the company (50%). Directs policy and develops strategies to implement directives from corporate headquarters in China (10%). Supervises the formulation of a purchase budget and implements procedures to make the import aspect of [the petitioner's] operation more efficient (10%). Also, supervises the satisfaction of tax and regulatory requirements of the company (10%). Obtains loans to meet cash requirements and to make decisions regarding disbursements (10%). Makes personnel decisions based upon the recommendations of the assistant general manager (10%).

\* \* \*

Because of the downturn in the worldwide economy, the beneficiary's main focus over the past six months prior to filing of this extension has been the generation of new business and the maintenance of former business relationships. . . . [T]he beneficiary exercises total discretionary decision making authority. As her primary efforts have been devoted toward business generation here in the United States, no one in the parent company in China has the ability to offer any direction or oversight. In short, she is on her own.

Her day-to-day duties vary, but approximately one half of her daily duties involve the generation of business. The remainder involves the general oversight and supervision of the company, communication with and giving directions to the

sales manager and the assistant general manager; overseeing the financial health of the company and making decisions regarding cash flow; forecasting future sales as it relates to the continuing viability of the company; communicating with the parent company and providing periodic verbal and/or written reports in the Chinese language.

In addition, counsel claimed that the beneficiary supervises the following employees:

#### Sales Manager

Manages sales activities of the company. Analyzes sales statistics to formulate policy and to assist dealers in promoting sales. Analyzes and controls expenditures of company to budgetary requirements. Prepares periodic sales report showing sales volume and potential sales.

#### Assistant General Manager

Works directly under General Manager and is responsible for assisting her with the overall operation of the company and carrying out her directives. Also responsible for the front line supervision of employees on a day-to-day basis.

#### Office Clerk

Performs clerical work including typing documents and correspondence under the supervision of the sales manager and assistant general manager. Also responsible for day-to-day office clerical duties.

Finally, counsel submitted copies of the petitioner's Forms DE-6, IRS Form 941, Quarterly Wage Report, and payroll summary. For the quarter ending March 31, 2003, the petitioner reported only one employee in addition to the beneficiary.

On November 18, 2003, the director denied the petition concluding that the petitioner failed to establish that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. entity. The director found that the petitioner had not established that the beneficiary has been managing a subordinate staff of professional, managerial, or supervisory personnel who relieve from performing non-qualifying duties.

On appeal, the petitioner's counsel claims, "The Service Center director was in error in concluding that the beneficiary was neither an executive nor an upper level manager of the petitioning company. The director was further in error in determining that the individuals that the respondent supervised were not themselves managers."

In examining the executive or managerial capacity of the beneficiary, the AAO will look to the description of the beneficiary's U.S. job duties to determine whether the beneficiary is primarily acting in a managerial or executive capacity. See 8 C.F.R. § 214.2(l)(3)(ii). In this matter, the petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in

managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid “executive/manager” and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager.

On review, the petitioner has failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. Although the director requested a more detailed description of the beneficiary’s duties, counsel’s letter provided a vague and nonspecific description of the beneficiary’s duties that fail to establish what the beneficiary does on a day-to-day basis. For example, the petitioner stated that the beneficiary’s proposed U.S. duties included “[d]irect[ing] the policy and develop[ing] strategies,” “devising long term strategies and goals necessary for the continued profitability of the company,” and “the general oversight and supervision of the company.” The petitioner did not, however, define or clarify these duties. 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)).

Further, 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 “exercise[ing] total discretionary decision making authority.” 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.). Specifics are clearly an important indication of whether a beneficiary’s duties are primarily executive in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

In addition, counsel’s July 30, 2003 letter described the beneficiary as dedicating “approximately one half of her daily duties” to “the generation of business.” Counsel also claimed that “the beneficiary’s “primary efforts” and “main focus over the past six months . . . has been the generation of new business and the maintenance of former business relationships.” This description appears to indicate that the beneficiary spends 50 percent of her time or more performing routine sales and marketing tasks. Even though counsel claims that there is a sales manager, it is apparent from the job description of the sales manager that he does not perform the sales of the company rather he “[m]anages sales activities of the company.” Further, the petitioner has not submitted evidence to establish that it employed the sales manager at the time the petition was filed. Since the beneficiary is performing the petitioner’s sales, the AAO notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO notes a discrepancy in the record with regard to the number of employees working for the petitioner at the time of filing on March 19, 2003. In the response to the director's request for additional evidence, the petitioner submitted a copy of its Forms DE-6 for 2002 and 2003 and Forms W-2 for 2002. On the Form DE-6 for the quarter ending June 30, 2003, it shows four employees' names consistent with the four employees described in the response to the request for additional information. However, there is only one employee other than the beneficiary on the Form DE-6 for the quarter ending March 31, 2003. Therefore, the record does not establish that the claimed sales manager, assistant general manager, and office clerk were actually employed by the petitioner when the petition was filed. These employees were reported for the first time in the month of April 2003. The petitioner reported one employee [REDACTED] for the quarter ending March 31, 2003, but has not provided her job title or duties. 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). 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).

Nevertheless, in response to the request for evidence, the petitioner claimed that the beneficiary manages three other employees. Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's 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. The possession of a bachelors 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. The petitioner claimed that the beneficiary managed three employees including a sales manager, assistant general manager, and an office clerk. In the instant matter, the petitioner has not, in fact, established that a bachelors degree is actually necessary, for example, to perform the clerical duties of the office clerk, who is among the beneficiary's subordinates. A managerial or executive 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. See *Matter of Church Scientology International*, 19 I&N

Dec. 593, 604 (Comm. 1988). In sum, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional personnel.

The AAO now turns to evaluating whether the beneficiary's subordinate employees are managerial or supervisory. Counsel claimed that the beneficiary's duties "involves giving directions to the sales manager and the assistant general manager." However, the subordinate employees duties are vague and general. It is unclear exactly what the subordinate employees' duties entail. For example, the sales manager's duties are described as [a]nalyz[ing] sales statistics to formulate policy" and "to assist dealers in promoting sales." The assistant general manager's duties are described as being "responsible for assisting [the beneficiary] with the overall operation of the company and carrying out her directives." Additionally, although counsel claimed that the assistant general manager is "responsible for the front line supervision of employees on a day-to-day basis," the AAO is not persuaded that the assistant general manager acts in this capacity rather than the beneficiary. 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. Thus, the petitioner has not shown that the beneficiary's subordinates are supervisory, professional, or managerial as required by section 101(a)(44)(A)(ii) of the Act.

A critical analysis of the nature of the petitioner's business indicates that the claimed subordinate employees do not relieve the beneficiary from performing non-qualifying duties. Rather, it appears from the record that the beneficiary's primary duties are non-qualifying. As the office clerk has been described as performing only clerical functions for the beneficiary, the sales manager and assistant general manager do not appear to be responsible for generating new business then it can only be assumed, and has not been proven otherwise, that the beneficiary is performing sales and marketing functions, including new business contacts, maintaining relationships with current customers, and performing any public relations tasks. Further, the record indicates that the beneficiary had no subordinates during the second half of 2002, and only one subordinate in the three months preceding the filing of the petition, which suggests that she was recently responsible for performing essentially all routine day-to-day administrative, operational, and clerical tasks in order to keep the business running. Based on the record of proceeding, the beneficiary's job duties are and have been principally composed of non-qualifying duties that preclude her from functioning in a primarily managerial or executive role. Again, 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).

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 is not persuaded that a qualifying relationship exists between it and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). 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 (BIA

1988); *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.

On review, there are several inconsistencies in the record. First, the stock certificate indicated that the foreign entity is the stockholder of 6,000 shares of the U.S. petitioner's authorized stock and there is no indication of the par value of these shares. Second, the stock transfer ledger indicated that 6,000 shares were issued to the foreign entity on April 24, 1997 and did not indicate the amount paid for the shares. Third, the articles of incorporation stated that the number of shares the U.S. corporation is authorized to issue is one million, but did not indicate that shares would be issued to the foreign entity. Fourth, the petitioner's 2002 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return reveals contradictory evidence that it is a wholly owned subsidiary of the foreign entity. Specifically, the tax return shows: 1) \$60,000 of common stock on Schedule L; 2) that one foreign person owned, directly or indirectly, 100 percent of the total voting power of all classes of stock or the value of all classes of stock of the U.S. company; and, 3) that at the end of the tax year an individual, partnership, corporation, estate, or trust owned directly or indirectly 100 percent of the U.S. company's voting stock. In addition, Form 5472, Part VI, indicated that the corporation does not import goods from the foreign related party. 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). 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). Consequently, it cannot be concluded that the petitioner has a qualifying relationship with a foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). 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.