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File: WAC 07 272 50651 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2008**

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 appeal will be dismissed.

The petitioner claims to be engaged in material regenerating and imports and exports. It seeks to extend the employment of its general manager in the United States as an 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, a California corporation, claims to be the subsidiary of Chinese Regenerating & Reusing Resources North Corp., located in Liaoning, China. The beneficiary was initially granted a one-year period of stay to open a new office, and the petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition, finding that the petitioner had not demonstrated that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that based on the evidence submitted, the beneficiary would not function at a senior level within the petitioner's organizational hierarchy.

On appeal, counsel for the petitioner asserts that the decision was arbitrary and that the director incorrectly adjudicated the petition under the wrong regulations. Additionally, counsel contends that the beneficiary will be in fact acting in a primarily executive capacity, and that the director failed to consider the fact that the petitioning entity is still in a start-up phase.

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.

This primary 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.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on September 19, 2007. In the petition, the petitioner indicated that it was established in 2005 and currently employed 5 persons. The petitioner claimed that the beneficiary would serve as its general manager. In support of the beneficiary's eligibility for the benefit sought, the petitioner submitted the following overview of the beneficiary's duties and responsibilities in a letter dated September 17, 2007:

[The beneficiary] will continue to fill the position of General Manager of [the petitioner]. Since his arrival in November 2006, he set up most of necessary departments, recruited qualified personnel. He has been working on setting corporate policy and corporation business direction, securing supply sources and supplier channel, improving materials inspection policy and procedure, working hard to meet the first year business plan and working on three years business forecast. The company currently has three department[s:] Operation Department (2), Export & Inspection (1) and Warehouse & Shipping (2), plus 3 commission based waste material purchasers.

[The beneficiary's] job duties on a daily basis will include the following: to ensure purchasing and exporting goals are on target and meet company expectations; to deliver and secure more supply sources and supplier channel; to actively seek domestic partners in waste materials collecting, recycling and processing; to improve quality control and export inspection; to monitor effective performance of all departments; to establish and maintain effective financial policies; establish and maintain effective communication and professional business relations[.] [The beneficiary] has been playing an important role in coordinating operations of [the petitioner] with those of other components of [the foreign entity].

[The beneficiary] has first-level managerial authority over all department managers. He will oversee all of the company's activities. He will have authority to make personnel decisions, including the recruitment and hiring of staff for the firm. While he is working with US branch company as the General Manager, he remains the control over the operation of the parent company in China. He will effectively supervise and coordinate personnel, ensuring optimal performance.

The director found this evidence insufficient to warrant approval of the petition and consequently issued a request for evidence on September 28, 2007. The director requested a more detailed description of the beneficiary's duties, as well as an overview of the petitioner's staffing levels, including an organizational chart listing all current employees, their position titles, and a complete description of each employee's position. The director also requested documentary evidence proving that the petitioner actually employed such persons and the wages paid to such persons, including but not limited to payroll summaries, Forms W-2 and/or Forms W-3,

In response, the petitioner submitted a letter dated December 5, 2007 which provided a more detailed overview of the beneficiary's duties. Specifically, the letter indicated the following:

[The beneficiary] is being offered the position of General Manager of [the petitioner]. He has been in this position about one year. Upon his arrival in the United States in November 2006, he set up three functional departments, Operation Dept., Import/Export Dept. and Shipping Dept. In order to secure the company's store yard and extend corporation business, he decided to purchase the ABC Liquidators, which is the lessor of the office, warehouse and storage yard of [the petitioner] and it engages in the hotel furniture liquidation business. The owner of ABC Liquidators, [REDACTED] is working with [the beneficiary] to reorganize this new business into [the petitioner] and he has been employed by [the petitioner] since October 2007. Warehouse & Shipping (2), plus 3 commission based waste material purchasers.

\* \* \*

The duties of [the beneficiary] in the US company are as follows:

Set up and supervise the direction, strategy and goal of corporate development, propose business development plan and budget, examine and approve financial budget, large recycle projects and corporative investment (15%); Oversee the business operation and activities of US company (25%); Set up other necessary departments, like Purchasing Dept., Liquidation Dept., recruit department managers and more qualified personnel, and coordinate with independent purchasers (10%); Monitor and follow the marketing trend of recycling and regenerating industry, related market and regulation research (10%); Develop and secure supply sources and supplier channel; seek domestic partners in materials recycling and processing, select and setup transit sites (15%); Analyze and decide recycle material categories to export; set and improve materials inspection policy and procedure (10%); oversee the business operation and direction of headquarters and other branches; coordinate the business activities between headquarters, US branch and other branches (10%); Other managerial activities (5%).

The petitioner also submitted an organizational chart with the response, which indicated that the beneficiary, as CEO and General Manager, oversaw the following employees:

- [REDACTED] Corporate Secretary/Department Manager of the Operations Department
- [REDACTED], Department Manager of the Import/Export Department
- [REDACTED] Department Manager of the Warehouse/Shipping Department
- [REDACTED] of ABC Liquidators and the Liquidation Department

The chart also indicated that [REDACTED] whose title is unspecified, worked directly under [REDACTED], and an additional, unidentified "independent purchaser" also works under the supervision of the beneficiary.

The petitioner also submitted documentation in the form of payroll records, tax returns, quarterly wage reports, and a Form W-3, Transmittal of Wage and Tax Statements, for 2006. The Form W-3 indicated that the petitioner paid \$6,000 in salaries during 2006. A review of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2006 further indicated that this \$6,000 did not represent wages or salaries paid to employees but rather compensation of officers. Further review indicates that the beneficiary was the recipient of this money.

Also submitted for review is the petitioner's Form 941, Employer's Quarterly Federal Tax Return and California Form DE-6, Quarterly Wage and Withholding Report, for the quarter ending September 30, 2007. It indicates that the petitioner paid wages to the beneficiary and six other employees, two of which are not listed as employees on the organizational chart. Furthermore, it is noted that the petitioner's alleged operations department manager, [REDACTED] is not listed as an employee on the Form DE-6.

On January 3, 2008, the director denied the petition. The director found that given the current structure of the petitioner, it did not have a reasonable need or the organizational complexity for the beneficiary to be employed in a primarily executive or managerial capacity.

On appeal, counsel asserts that the director's decision is in error, and specifically cites to the director's erroneous reliance on 8 C.F.R. § 204.5(j)(4)(ii). Counsel contends that the beneficiary is in fact a qualified executive and urges reconsideration of the petition.

The AAO, upon review of the record of proceeding, concurs with the director's finding.

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). In this case, the petitioner vaguely described the beneficiary's duties but failed to provide a specific overview of how he will refrain from performing non-qualifying tasks. The two letters submitted by the petitioner which outline the beneficiary's duties and role in the company provide a generic and at times an incomprehensive overview of the beneficiary's job duties. For example, while the letter submitted in response to the request for evidence includes the percentage of time the beneficiary will devote to each stated task, several descriptions, such as "other managerial activities" and "oversee the business operation and activities of US company" are too vague to decipher in terms of the day-to-day activities in which the beneficiary will engage. Moreover, the AAO notes that the statements provided give no insight on the 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. *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).

Furthermore, the petitioner indicated in its September 17, 2007 letter that some of the beneficiary's tasks included delivering and securing more supply sources and supplier channels, actively seeking domestic partners in waste materials collecting, recycling and processing, and improving quality control and export

**inspection.** Again, this overview is not entirely clear in its description of the beneficiary's tasks. However, it can be concluded that tasks such as "actively seeking domestic partners in waste materials collecting" are not typically the tasks of someone employed in a primarily executive capacity, as alleged by counsel. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). Since it is claimed that material regeneration is the primary focus of the petitioner's business, it appears that tasks such as these are necessary to provide the petitioner's services.

Additionally, the director reviewed the staffing levels and reasonable needs of the petitioner in rendering the denial in this matter. Counsel correctly observes that the director incorrectly cited to the regulation at 8 C.F.R. § 204.5(j)(4)(ii) when discussing staffing levels and reasonable needs on page 3 of the decision. While the AAO agrees that this provision is not the applicable regulation for nonimmigrant petitions, the director's error is harmless in that the language contained therein is also applicable to the instant case, as discussed in further detail below.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, 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 several reasons.

First, as discussed above, the description of duties for the beneficiary, coupled with the minimal information pertaining to his subordinates and the manner in which they will relieve the beneficiary from engaging in non-qualifying tasks, is insufficient for purposes of this classification. More importantly, however, is the actual structure of the petitioner. In the request for evidence, the petitioner was specifically requested to submit evidence of wages paid to his staff during the first year of operations. In response, the petitioner submitted evidence that the beneficiary received \$6,000 as officer compensation (no wages) and that it began paying wages to employees in the second quarter of 2007. It should be noted that the beneficiary's initial period of stay commenced on October 19, 2006 and expired on October 1, 2007.

To establish that the petitioner has staffed the new operation in the previous year, the petitioner must submit a description of staffing, including the number of employees and the types of positions, as well as evidence of the wages paid to the employees. 8 C.F.R. § 214.2(l)(14)(ii)(D). The petitioner submitted a

document in which it provided employee information, such as position details, date of hire, and duties. From this chart, the AAO notes the following relative information pertaining to the petitioner's employees:

Name: [REDACTED]  
Job Title: Department Manager (Corporate Secretary)  
Educational Level: University  
Employment Period: 12/2005 to Present

Name: [REDACTED]  
Job Title: Administrative Assistant  
Educational Level: University  
Employment Period: 10/01/2007 to Present

Name: [REDACTED]  
Job Title: IT Specialist  
Educational Level: University  
Employment Period: 6/1/2007 to 9/30/2007

Name: [REDACTED]  
Job Title: Department Manager  
Educational Level: University  
Employment Period: 04/01/2007 to Present

Name: [REDACTED]  
Job Title: Worker  
Educational Level: High School  
Employment Period: 06/01/2007 to 09/30/2007

Name: [REDACTED]  
Job Title: Department Manager  
Educational Level: University  
Employment Period: 04/01/2007 to Present

Name: [REDACTED]  
Job Title: Department Manager  
Educational Level: High School  
Employment Period: 10/01/2007 to Present

Upon review, it appears that [REDACTED] IT Specialist, and [REDACTED] Worker, left the petitioner's employ on September 30, 2007. Therefore, based on the petitioner's information, the company employed five persons at the time of filing. The petitioner's Form DE-6 for the third quarter of 2007 confirms the employment of five employees.

However, the department manager of operations, ██████████, is not listed on this form. It is noted that on the list accompanying the petitioner's organizational chart, it claims that ██████████ is paid by "commission plus performance bonus." However, the petitioner has not presented evidence to document the existence of this employee nor identified the services this individual provides. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

In addition, the petitioner indicates that all of the current employees discussed above, except for Mr. ██████████ attended university. Moreover, it is noted that aside from ██████████, the remaining four employees possess the title of "Department Manager." 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. The possession of a bachelor's degree by a subordinate employee, or, as here, the claim that the employee has attended university, 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 case, the petitioner has not, in fact, established that a bachelor's degree is actually necessary, for example, to perform the work of the administrative assistant or of any of the four other department managers.

In addition, the petitioner has likewise failed to show that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Although four of the five claimed subordinates possess the title of "department manager," this alone is insufficient to establish that they are managerial or supervisory employees. An employee will not be considered to be a supervisor simply because of a job title. Moreover, a review of the organizational chart indicates that despite the managerial titles held by these employees, they do not supervise subordinate staff nor has the petitioner established that they manage a dedicated function of the petitioner. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Absent evidence to the contrary, it does not appear that the beneficiary will be primarily performing managerial or executive duties. As stated above, an employee will not be considered to be a supervisor

simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Given the size and nature of the vaguely described material regenerating business, it is more likely than not that the beneficiary and his proposed subordinate managers will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed by the beneficiary on a day-to-day basis. For this reason, the petition may not be approved.

Beyond the decision of the director, a question exists with regard to the claimed qualifying relationship between the petitioner and the claimed foreign parent. *See* 8 C.F.R. § 214.2(l)(3)(1). On Form I-129, the petitioner claims that it is owned in its entirety by the foreign entity. In support of this contention, the record contains a stock certificate, stock ledger, and the articles of incorporation for the petitioner, which indicate that the foreign corporation owns all outstanding shares issued in the petitioner.

A review of the petitioner's Form 1120 for 2006, however, indicates that the beneficiary, as an individual, claims to be the sole shareholder in the petitioner. If the beneficiary is the majority owner of the foreign entity, then the companies would be deemed affiliates and a qualifying relationship would be deemed to exist. However, the record contains no documentation pertaining to the ownership of the foreign entity, and the fact that the petitioner's 2006 tax return lists the beneficiary, as an individual, as its sole owner, creates unresolved questions. 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. Absent evidence of the ownership of the foreign entity, it cannot be determined whether a qualifying relationship exists between the parties. 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff

can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.

**ORDER:** The appeal is dismissed.