D7

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: WAC 99 056 50348 OFFICE: CALIFORNIA SERVICE CENTER DATE 23 APR 2002

IN RE: PETITIONER: [redacted]
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:

[redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is engaged in international trade between the United States, Hong Kong and China. The petitioner seeks to employ the beneficiary in the United States as its general manager. The director determined that the petitioner had not established a qualifying relationship with a foreign entity, had not established that it had been doing business on a regular and systematic basis and had not established that the beneficiary would be employed in either a managerial or an executive capacity.

On appeal, counsel for the petitioner asserts that the Service's decision is erroneous and its interpretation of Service regulations is incorrect.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

The petitioner was incorporated in 1994 in the State of California and stock was issued to the beneficiary and one other individual in equal amounts. The foreign entity in this case is Shanghai Ye [redacted] a company the petitioner claims is owned by the beneficiary and one other individual in equal amounts. The petitioner employs six individuals including its president, a general manager (the beneficiary's position), an accountant, a purchasing clerk, an office clerk and an import and export clerk. The petitioner is

seeking an extension of an L-1 visa classification for the beneficiary as its general manager.

The first issue in this case is whether the petitioner has provided sufficient evidence of a qualifying relationship between the foreign entity and the United States entity.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

> *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 (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

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

8 C.F.R. 214.2(l)(1)(ii)(K) states:

> *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.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

> *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 petitioner initially submitted a statement dated December 2, 1998 signed by its president indicating that the petitioner was a joint venture between the foreign entity, [redacted] and an U.S. citizen. The petitioner indicated [redacted] held 50 percent of its shares and the other 50 percent was held by the U.S. citizen and further that each joint venturer had effective control of the petitioner through its veto power. The petitioner provided a copy of its articles of incorporation, its by-laws and stock certificates issued to [redacted] (the U.S. citizen) and the beneficiary in equal amounts. The petitioner also provided its stock transfer ledger indicating that originally a stock certificate for 25,000 shares was issued to Sing Wood Yeh, an individual who then transferred his shares to the foreign entity, [redacted] in October of 1995. The stock ledger further indicates Ye Chen transferred its 25,000 shares to the beneficiary on January 1, 1996. The petitioner also provided a statement from the foreign entity indicating that it owned 50 percent of the petitioner and had veto power over corporate decisions.

The director requested additional evidence on January 25, 1999 showing the ownership and control of the petitioner, including evidence to demonstrate that the parent company had in fact paid for the ownership of the U.S. entity.

In response, the petitioner re-submitted its issued stock certificates. The petitioner also submitted a notice of transaction indicating that it had authorized the issuance of 50,000 shares of common stock, its original bank statements and a notary's certificate indicating that the beneficiary owned 50 percent of [redacted] the foreign entity in this case.

The director determined that the petitioner had not submitted evidence that the parent company, the foreign entity in this case, had paid for the stock issued and concluded that the petitioner had not established a qualifying relationship with a foreign entity.

On appeal, counsel for the petitioner claims that the petitioner is an affiliate of the foreign entity because both the petitioner and the foreign entity are owned and controlled by the beneficiary and one other individual. Counsel explains the transfer of 25,000 shares of the petitioner from [redacted] the foreign entity, to the beneficiary as follows:

[b]efore this 50% interest has been transferred to the

> beneficiary, no payment has been made to the Petitioner for the shares represented by such 50% interest. Thus, the arrangement has been made that the Beneficiary paid directly to the petitioner, instead of Ye Chen, the purchase price of $71,000 for the 50% interest in the Petitioner transferred from Ye Chen to the Beneficiary. Thus on August 13, 1996, the Beneficiary drew a check payable to the Petitioner.

Counsel asserts that based on the corrected record, there is a qualifying affiliate relationship between the petitioner and the foreign entity for the purpose of L-1 classification.

Counsel's assertion is not persuasive. The petitioner has provided inconsistent information regarding the ownership and control of the petitioner. In the petition filed December of 1998, the petitioner clearly stated that it was partially owned by the foreign entity while also providing a stock ledger that indicated otherwise. 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 (BIA 1988).

In addition, the petitioner provides on appeal, the beneficiary's check allegedly purchasing the 25,000 shares from the foreign entity but made payable directly to the petitioner. The check is dated August 13, 1996 and was deposited August 15, 1996 and thus was clearly available at the time of the director's request for evidence. Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

Further, the petitioner has provided a letter from the beneficiary and a notary to indicate that the beneficiary owns 50 percent of the foreign entity. Such statements are not sufficient to show the ownership and control of the foreign entity. The petitioner has not provided any documentation to support the claimed ownership and control of the foreign entity. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). As regulation and case law confirm, ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19

I&N Dec. 593 (BIA 1988) (in immigrant proceedings).

Finally, the petitioner has failed to provide any underlying agreements that support its contention that the beneficiary's claimed 50 percent ownership in either itself or the foreign entity controls the corporate decisions of either entity through veto power.

On review, the petitioner has not provided sufficient consistent evidence to demonstrate ownership and control of either itself or the foreign entity in this case.

The second issue in this proceeding is whether the petitioner has provided sufficient evidence to demonstrate that it is doing business in a regular, continuous and systematic fashion. On review of the record, the petitioner has submitted sufficient documentation of transactions to demonstrate that it is conducting business as defined by the Act. The determination of the director that the petitioner had not established that it was doing business has been overcome. As it relates to this issue, the decision of the director will be withdrawn.

The third issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial, executive or specialized knowledge 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.

In the petition, the petitioner described the beneficiary's job duties as follows:

> Managing, directing and supervising general overall business operations; ensuring the proper functioning of the financial system; establishing and developing new purchasing territories and channels; hiring and firing workers; developing business plans and strategies; directing activities of workers on product trading, distribution, promotion, and development; and managing business activities and administrative affairs to ensure the effective and efficient marketing, management, and administration of the company. In detail, [the beneficiary] will be in charge of setting up purchasing channels for construction materials; directing business activities related to demands form [sic] our affiliate company, as well as the supplies for construction material/equipment required for activities; making and performing business strategies and plans for purchasing; and conducting and coordinating the purchasing business cooperation between our company and our affiliate company in China.

The director requested that the petitioner submit additional evidence on this issue including a list of the employees under the beneficiary's supervision with their job titles and a brief description of their job duties.

In reply, the petitioner repeated the above job description for the beneficiary and included a list of employees and job descriptions as follows:

> 1. The president is to be in charge of overall executive affairs and making company and business policies.
>
> 2. The Import/Export Manager is to be in charge of the daily activities of import/exporting construction materials and equipment purchased in the Tjnited [sic] States.
>
> 3. The Accountant is responsible for accounting and bookkeeping affairs.
>
> 4. The purchasing clerk is responsible for purchasing activities of company for exporting purposes.
>
> 5. The office clerk is responsible for office administration work.

The petitioner also provided Internal Revenue Service Forms 941 and W-2 Wage and Tax Statements for the years 1997 and 1998.

The director determined that the evidence indicated that the beneficiary would not manage a subordinate staff of professional, managerial or supervisory personnel who would relieve him from performing the services of the company. The director also concluded that the evidence did not demonstrate that the beneficiary would function at a senior level within the organizational hierarchy other than in position title. The director also determined that the beneficiary would not be managing or directing the management of a department, subdivision, function, or component of the organization.

On appeal, counsel asserts that:

> [w]hile a person, like the Beneficiary in this case, performs other tasks of the organization in order to provide the services of the organization, he also performs the core functions of managing and controlling the organization. In performing such core functions of management, the beneficiary is qualified as a manager or executive under the section 214.2(l)(B)((3)).

Counsel concludes by stating that the beneficiary's duties as a general manager as stated and actually performed can be characterized as managerial and executive in nature.

Counsel's conclusion is not persuasive. The petitioner's description of the beneficiary's job duties is not sufficient to warrant a finding the beneficiary is acting in a managerial or

executive capacity. The description of job duties is vague and general in nature, essentially serving to paraphrase the elements of the statutory definition of managerial and executive capacity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position.

The record reveals that at the time of filing the petition, the petitioner did not have a staff sufficient to relieve the beneficiary from performing non-qualifying duties. The Internal Revenue Service W-2 Wage and Tax Statement Form reveals that the petitioner employed five individuals in 1997, three of which appeared to be employed on a part-time basis. The 1998 Internal Revenue Service W-2 Wage and Tax Statement Form reveals that the petitioner employed seven individuals in 1998, four of which appeared to be employed on a part-time basis. Counsel also recognizes that the beneficiary performs services for the petitioner. As noted by the director, 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 record does not reveal the beneficiary's daily duties and responsibilities in detail and thus it is not possible to conclude that the beneficiary's primary duties relate to managing or directing the management of the organization rather than primarily performing the services necessary to continue the operations of the petitioner.

Further, the record is not persuasive in establishing that the beneficiary directs or manages a core function of the petitioner through the work of others rather than primarily performing the core functions of the petitioner. On review, the record does not support a finding that the beneficiary's duties are duties of one who functions or will function at a senior level within an organizational hierarchy other than in position title.

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.