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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

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

APR 08 2003

FILE: WAC 01 110 53818 Office: CALIFORNIA SERVICE CENTER

Date:

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:

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

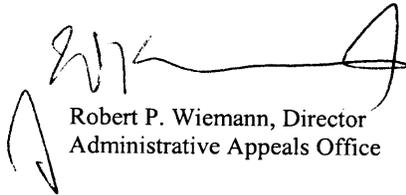
INSTRUCTIONS:

This is the decision 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.

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 that 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 Bureau of Citizenship and Immigration Services (Bureau) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] claims to be the subsidiary of a Chinese company, [REDACTED]

[REDACTED] sells telephone calling cards through its Internet web site. The U.S. entity was incorporated in the State of California on July 7, 1999. The petitioner now seeks to hire the beneficiary as a new employee. The U.S. entity, therefore, is petitioning the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's capital manager at an annual salary of \$36,000. The director determined, however, that the beneficiary did not qualify as an executive or a manager. Furthermore, the director concluded that the petitioner failed to establish a qualifying relationship between the U.S. entity and the Chinese company. On appeal, the petitioner's counsel asserts that the beneficiary works in an executive or managerial capacity and that the U.S. entity is a subsidiary of the Chinese company.

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 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.

Under 8 C.F.R. § 214.2(1)(3), 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 (1)(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 with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The first issue in this proceeding is whether the beneficiary will be primarily employed in an executive or managerial 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.

When examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii). On Form I-129, the petitioner described the beneficiary's duties as "Capital Manager responsible for [the] Accounting, Office Administration and Research and Development Departments." Additionally, a February 8, 2001 letter from the petitioner stated:

[REDACTED] unique experience, technical background and infinite energy have quickly proven effective and indispensable to the growth of Intetac. Now, he will transfer his skills and abilities to [REDACTED] and manage all aspects of [REDACTED] finances to ensure the success for this American venture. This will involve [REDACTED] actively taking full command of several [REDACTED] departments. He will be Capital [Manager] for [REDACTED] responsible for overseeing the accounting department, the general office administration and the research and development department.

These are crucial components of [REDACTED] new business direction and an integral function for [REDACTED]. His initial tasks will be to establish these departments with minimum disruption to the on-going telecommunications business. He will be responsible for all day-to-day management of the company including the hiring and firing of the employ[ee]s that will work under his supervision.

In addition to the descriptions above, the petitioner submitted an organizational chart. The chart depicts the beneficiary as part of the capital management department. In turn, the chart shows him as supervising the office administration, accounting, and research and development departments. Only one employee, [REDACTED] appears under the office administration heading. The record contains no explanation of her duties. No employees appear in the accounting or research and development departments. The evidence also includes California Form DE-6 listing wages paid for the quarters ending June 30, 2000, September 30, 2000, and December 31, 2000. The report for the quarter ending June 30, 2000, lists three employees; the report for the quarter ending September 30, 2000, lists four employees; and the report for the quarter ending December 31, 2000, lists four employees. The petitioner did not describe the duties for any of the employees listed the quarterly wage reporting forms.

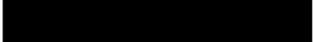
The evidence cited above is general, largely paraphrasing the statutory and regulatory executive and managerial definitions. Furthermore, apart from the lack of any employees in two departments, the record fails to describe the duties of the one person whom the beneficiary supervises. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

On appeal, counsel submitted additional evidence to bolster the petitioner's claim that the beneficiary will serve as a manager or an executive. In particular, counsel presents new evidence purportedly demonstrating that the beneficiary supervises more employees than originally claimed. The evidence includes quarterly wage reports, agreements with contractors and interns, and an organizational chart.

The additional quarterly reports list wages paid for the periods ending June 30, 2001, and September 30, 2001. The report for the quarter ending June 30, 2001, lists four employees, while the report for the quarter ending September 30, 2001, lists five employees. The petitioner did not describe the duties for any

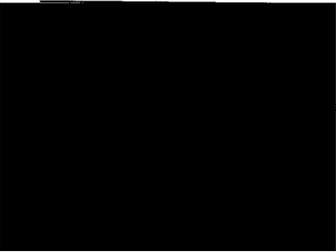
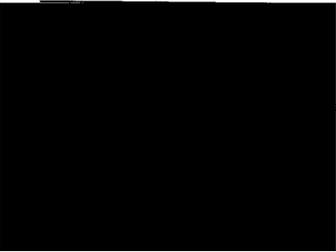
of the employees listed on the additional quarterly wage reporting forms.

The agreements with the contractors are:

<u>Signed</u>	<u>Contractor Name</u>	<u>Job Title</u>
06/15/01		Marketing Consultant
08/09/01		System Design Consultant
09/17/01		Web Designer

The agreements between the contractors and the petitioner contain generic and broad language describing educational requirements and possible work duties. In turn, each contractor simply initialed an underline next to the appropriate job title, job description and educational requirements. The job titles and descriptions are so broad that it is unlikely each contractor will perform all the listed tasks. In other words, the lists fail to explain in detail what tasks the contractors will actually perform for the U.S. entity. Moreover, the agreements state that the U.S. entity has a commitment to employ each contractor for a minimum of only 12 weeks. After that period, each contractor will be employed "at will." Thus, it is unclear how long the beneficiary will actually supervise the contractors. Finally, other than standard legal language which prevents the contractors from sharing the U.S. entity's proprietary information, the agreements permit the contractors to seek other concurrent employment. Consequently, it is unclear whether the contractors will work full-time for the petitioner.

The agreements with the interns are:

<u>Signed</u>	<u>Contractor Name</u>
03/01/01	
03/01/01	
07/02/01	
07/02/01	
07/02/01	
07/02/01	

The intern agreements indicate that the interns are "at will" employees; furthermore, the agreements do not specify what tasks the interns will perform.

The organizational chart lists the beneficiary as supervising two departments: financial management and research and development. The financial management department contains one employee, while the research department contains two contractors and four interns. The organization chart provides no details regarding the contractors or interns' job duties, however.

In sum, the quarterly reports, agreements with contractors and interns, and the organizational charts, which counsel submitted on appeal, do not establish the actual duties either the beneficiary or his alleged subordinates perform. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; see generally *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*.

Moreover, the petitioner's failure to identify the supervised employees' actual duties makes it impossible for the Bureau to determine whether the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing his nonqualifying duties. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology*, 19 I&N 593, 604 (Comm. 1988). Therefore, the record as presented to the director, cannot demonstrate that the beneficiary will serve in a primarily executive or managerial capacity.

The AAO now turns to the question of whether the petitioner is a qualifying organization. The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(G) state:

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 (1)(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.

In pertinent part, the regulations define "parent," "branch," "subsidiary," and "affiliate" as:

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

* * *

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

* * *

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.

* * *

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.

8 C.F.R. §§ 214.2(1)(1)(ii)(I), (J), (K), and (L).

The petitioner indicated on Form I-129 and in its February 8, 2001 letter that it is a subsidiary of a Chinese company, [REDACTED]. Specifically, the petitioner asserts that it is a subsidiary because [REDACTED] purchased at least 51 percent of the U.S. entity's stock. On appeal, counsel reiterates the petitioner's claim that [REDACTED] secured 51 percent ownership of the U.S. entity through international wire transfers.

The regulations 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 nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, *supra* at 604.

Counsel asserts that, to satisfy Chinese currency exchange regulations, Intetac wired money through Chinese and U.S. intermediaries to purchase the 51 percent ownership. To support this contention, counsel submitted a January 28, 2000 agreement in which Intetac agreed to transfer Chinese currency to [REDACTED]. In turn, after receiving the funds [REDACTED] was to transfer the funds to Cybercalling.com's attorney. The record appears to contain four international wire transfer transactions:

July 28, 1999, \$49,985.00

- Originating Bank: Unstated
- Originating Parties: [REDACTED] and [REDACTED]
- Destination Bank: Bank of America [REDACTED]
- Destination Party: [REDACTED]

March 17, 2000, \$99,980.00

- Originating Bank: HSBC Bank USA
- Originating Party: [REDACTED]
- Destination Bank: Wells Fargo Bank
- Destination Party: [REDACTED] Attorney-Client Trust

November 24, 2000, \$250,000.00

- Originating Bank: Hang Seng Bank Ltd
- Originating Party: Unstated
- Destination Bank: Wells Fargo Bank
- Destination Party: Law Offices of [REDACTED]

January 17, 2001, \$249,985.00

- Originating Bank: Kincheng Banking Corporation
- Originating Party: [REDACTED]
- Destination Bank: Wells Fargo Bank
- Destination Party: Law Offices of [REDACTED]

On three occasions, either the Law Offices of [REDACTED] or the [REDACTED] Attorney-Client Trust appear to have forwarded the following sums to Cybercalling.com:

March 20, 2000

- \$99,980.00 by Attorney-Client Trust Check #1428
- Appears to be related to the March 17, 2000, wire transfer

November 29, 2000

- \$250,000.00 by wire transfer
- Appears to be related to the November 24, 2000 wire transfer

January 19, 2001

- \$250,000.00 by wire transfer
- Appears to be related to the January 17, 2001 wire transfer

The wire transfer evidence above raises significant credibility issues. First, the record contains no direct evidence demonstrating that the transferred funds originated from the claimed parent company Intetac. Second, the March 17, 2000, November 24, 2000, and January 17, 2001 transactions do not appear to comport with the January 28, 2000 agreement; specifically, [REDACTED] did not serve as the intermediary. Instead, on March 27, 2000 and January 17, 2001, [REDACTED] appears to have been the intermediary, while no intermediary is listed for November 24, 2000 transaction. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA

1988). Given the unexplained inconsistencies discussed above, the AAO affirms the director's finding that the wire transfers do not establish a qualifying relationship between the U.S. and foreign entities.

Moreover, the AAO observes that the record contains conflicting evidence regarding the U.S. entity's stock as well. The articles of incorporation, filed July 7, 1999, state, "This corporation is authorized to issue only one class of shares of stock which shall be designated common stock. The total number of shares it is authorized is ONE MILLION (1,000,000) shares" (upper case capitalization in original). A stock certificate and stock ledgers show that, as of the date the petitioner filed its Form I-129, three parties owned stock in the U.S. entity. The three parties and the amount of stock they own are:

Owner	Shares
[REDACTED]	345,647
[REDACTED]	300,000
[REDACTED] Office Administration Employee	32,092
Total	<u>677,739</u>

The total number of outstanding shares multiplied by 51 percent yields 345,646.89 shares; thus, the Chinese entity would appear to own 51 percent of the outstanding shares. A document entitled, "Common Stock Transfer Ledger," refers only to the stock which Ou Ou and [REDACTED] own. No other evidence contradicts Ou Ou and [REDACTED] status as common stock owners.

In contrast, the record describes Intetac's ownership inconsistently. A document labeled, "Series A Preferred Common Stock Transfer Ledger," indicates that, on January 22, 2001, Intetac purchased 345,647 shares of that stock class. Furthermore, on January 22, 2001, Intetac's board of directors passed a unanimous resolution approving the purchase of the 345,647 shares of "Preferred Series A stock." A June 12, 2000 filing with the California State Department of Corporations confirms that the petitioner sold common, preferred stock. Likewise, an April 17, 2001 filing with the California State Department of Corporations confirms that the petitioner sold Preferred Class A stock. In contrast, on January 22, 2001, the petitioner issued certificate number 7 for 345,647 shares of common stock to the Chinese entity. The record is further inconsistent in that the common stock transfer ledger lists certificate number 7 as void.

As explained previously, the regulations 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 nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc., supra*; *Matter of Hughes, supra*; see also *Matter of Church Scientology International, supra* at 604. Moreover, as noted above, the petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho, supra*. Furthermore, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. In short, the record lacks credibility because it does not demonstrate unequivocally what classes of stock the petitioner has issued and sold.

Common stock and preferred stock each carry different privileges; therefore, the difference in classes is significant. Common stock is "A class of stock entitling the holder to vote on corporate matters; to receive dividends after other claims have been paid (esp. to preferred shareholders), and to share in assets upon liquidation. BLACK'S LAW DICTIONARY 1428 (7th ed. 1999). Preferred stock is "A class of stock giving its holder a preferential claim to dividends and to corporate assets upon liquidation but that usu[ally] carries no voting rights." *Id.* at 1430. The petitioner did not specify whether the preferred stock carries any voting rights. Consequently, although the Chinese entity may own 51 percent of all the stock, it is unclear whether that 51 percent bestows any voting rights. Therefore, even though [REDACTED] and [REDACTED] own together only 49 percent of the stock, they may have voting rights while the Chinese entity may not. Thus, [REDACTED] and [REDACTED] may actually control the petitioner. Moreover, as [REDACTED] owns 44 percent of the stock with clear voting rights, he - rather than the Chinese entity - may actually control the petitioner. In sum, the lack of independent objective evidence fails to resolve any inconsistencies regarding the parties' voting rights. Therefore, the petitioner does not qualify as a subsidiary. *Matter of Ho, supra*; *Matter of Treasure Craft of California, supra*.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation); *Ikea*, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

ENDS