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U.S. Department of Justice

Immigration and Naturalization Service

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



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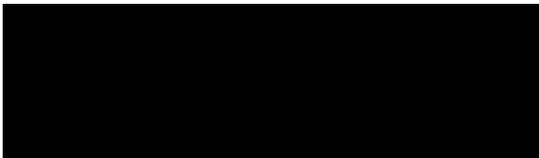
Date: APR 23 2001

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:



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 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

*Myma L. Rosenbey*  
Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, an import/export company, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its vice president. The director determined that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities, that the petitioner had secured sufficient physical premises to house the office, that the beneficiary had been or would be employed in a primarily managerial or executive capacity, or the size of the U.S. investment and the financial ability of the U.S. entity to remunerate the beneficiary and to continue doing business.

On appeal, counsel argues that there is a qualifying relationship between the U.S. and foreign entities, that the petitioner has secured sufficient physical premises to house the office, and that the beneficiary will be employed in a primarily executive capacity.

It is noted that the issue raised by the director regarding whether the petitioner had secured sufficient physical premises to house a its office is not an issue for consideration in a petition for extension of previously approved employment and should have been discussed in connection with the adjudication of the original petition.

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(1)(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 (1)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, a 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.

The U.S. petitioner states that it was established in 1997 and that it is a wholly-owned subsidiary of [REDACTED] located in New Delhi, India. The petitioner declares one employee and an "anticipated" gross annual income of approximately \$300,000. It seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$30,000.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities.

8 C.F.R. 214.2(1)(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 (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.

8 C.F.R. 214.2(1)(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 operating 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 claims that the U.S. entity, Eastside Trading, Inc., is a wholly-owned subsidiary of Sri Sathya Exports, an Indian company. The petitioner submitted share certificate number 1 showing that as of January 6, 1998, Sri Sathya Exports owns 10,000 of 200 authorized shares of East Side Trading's stock.

In a letter dated April 16, 1999, the petitioner was requested to respond to the following:

Submit additional evidence to establish that there exists a qualifying L-1 relationship between the business in the United States and the foreign entity.

Submit a copy of the stock ledger for the United States entity, which shows all of the stock transactions since its incorporation. Please submit evidence which establishes the method in which the foreign entity acquired the shares of stock listed on the stock certificate. Such evidence would include copies of checks, evidence, of financial transfer, or other consideration.

The stock certificate that you have submitted shows that the foreign entity owns 10,000 shares of the US company. It appears that the US company is only authorized to issue 200 shares of stock.

In response to a request for additional information, counsel explained that this certificate had been voided, and submitted share certificate number 2 showing that as of January 6, 1998, the foreign entity owns 200 of 200 authorized shares of the U.S. entity's stock. Counsel did not submit any documentation to establish the method by which the foreign entity acquired the U.S. entity's stock.

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 of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). 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. Id.

A certificate of stock is merely written evidence that a named person is owner of a designated number of shares of stock in a corporation. Black's Law Dictionary (Fifth Edition, West Publishing Company, 1979). The regulation at 8 C.F.R. 103.2(b)(8) specifically allows the director to request additional evidence in appropriate cases. As ownership is a critical element of this visa classification, the Service may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. The petitioner was specifically requested to submit evidence establishing the method in which the foreign entity acquired the U.S. entity's stock, such as copies of checks or evidence of financial transfers. There is no such evidence within the record.

In a letter dated June 1, 1999, counsel claimed that the Indian government prohibits the transfer or taking of money from India, and that the parent company transferred money to the U.S. entity by way of its investment in other entities, and by way of goods

shipped to the United States. There is no evidence in the record showing that any entity provided the U.S. with cash or goods at the request of the foreign entity. Counsel claims that the foreign entity "commits itself to financially give 100 per cent financial support" to the U.S. entity.

On appeal, counsel again states that the "monies could not be transferred out of" India, but claims that the foreign entity has made arrangements "to transfer funds from India in order to fulfill [its] financial requirements." Counsel explains that the U.S. entity will be given access to funds owed to the foreign parent company by other U.S. entities. There are no letters from other U.S. entities stating that they owe the foreign entity money, specifying how much they owe, and agreeing to provide this money to the U.S. entity. Further, according to counsel's appellate brief, the foreign entity merely intends to provide the U.S. entity with funds, but has not yet done so. Accordingly, it does not appear that the foreign entity directly or indirectly provided the U.S. entity with any funds in order to purchase its stock. The petitioner has submitted insufficient evidence to establish the ownership of the U.S. entity. Accordingly, it cannot be determined whether there is a qualifying relationship between the U.S. and foreign entities. For this reason, the petition may not be approved.

The other issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"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:

"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 a letter dated January 12, 1999, the petitioner describes the beneficiary's duties as follows:

Mr. [REDACTED] as a senior level executive for the company, analyzes the U.S market for [the] foreign company and vice versa. He deals with foreign clients on appropriate inventory for their market as to [the] type of goods needed as well as negotiating sales with both retail and other wholesale sellers. While the company has not yet taken off as expected, partly due to the fact that an executive has not been able to be present in the United States, Mr. [REDACTED] has been chosen to initiate business and to create a good client base. This responsibility alone signifies that he is indeed the top level executive of the company who is responsible for establishing the business from the ground up.

It is clear that the beneficiary will be performing executive functions. As the Executive, he is in charge of the direct operation of the US company. Mr. [REDACTED] major duties are outlined as follows:

- a. Reflect[s] and interchanges ideas to the Board of Directors and Stockholder[s] regarding business expansion and marketing
- b. Prepares the business planning, marketing of the company, as well as establishing goals by: budgeting for upcoming years, setting goals for new business, market and product development, analyze product and market features, reinforce and expand business connections in the United States and abroad
- c. Ensures that market is always on top. Take Priority [sic] to create more sales, profits, more jobs.

The beneficiary...exercises...wide latitude and receives only general input and supervision from high company executives. Mr. [REDACTED] contacts abroad are extremely critical to the U.S. company's success and he has been able to expand the company business abroad by his personal contacts and reputation. [REDACTED] Inc., allows Mr. [REDACTED] to take free reign of this company's Marketing [sic] and expansion as is critical for revenue producing business. Thus, based upon the definition of executive capacity[,] Mr. [REDACTED] directs the management of the organization or a major component or function of the organization; he establishes the goals and policies of the organization, component or function; he exercises wide latitude in discretionary decision-making; and receives only general supervision or direction from higher level executives, the board of directors or stockholders of the organization.

In a letter dated April 16, 1999, the Service requested that the petitioner respond to the following:

It is not clear that the duties of the proffered job are primarily managerial or executive in nature. Your statements concerning the proposed duties identifies [sic] general managerial functions and resembles restated portions of INS regulations. The duties outlined are vague and do not specify exactly what duties the beneficiary will perform. What does the beneficiary do that qualifies him/her as a manager or an executive, other than in title?

Submit a comprehensive description of the beneficiary's duties. Also indicate how the beneficiary's duties have been and will be managerial or executive in nature. For executive or managerial consideration, you must also: (1) demonstrate that the beneficiary functions at a senior level within an organizational hierarchy other than in position title; and (2) demonstrate that the beneficiary has been and will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve him/her from performing nonqualifying duties, if appropriate.

Submit a list of all your United States employees that identifies each employee by name and position title. In addition, submit a complete position description for each of your United States employees, including one for the beneficiary's position. Submit a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis, including one for the beneficiary.

In response, the beneficiary's duties were further described as follows:

The beneficiary will serve as the Executive Officer of *Eastside Trading* where he will perform all the duties of an executive including overseeing the day to day business, making key corporate decisions, negotiating substantial contracts with professionals, hiring and firing employees and formulating corporate policies, and other items commensurate with that post. The beneficiary is in control of managing the organization and taking actions for the success of the organization. He is in charge of supervising supervisory and professional staff and is a key figure in the organizational. His job duties are based upon a day to day function that requires him to be involved completely with every aspect of the business.

\* \* \*

The beneficiary has been the founder and senior executive of the company and is solely responsible for the procurement and extension of the company and its success. He has supervised and controlled the work of other supervisory as well as professional employees of the organization. He had the authority to hire and fire employees as well as be able to take other personnel actions such as promotions and leave authorization. The beneficiary helped establishing the goals and policies

of the organization. He has dynamic goal setting skills as well as Time management, Creative Problem Solving and Decision-Making skills.

On appeal, counsel essentially repeats the January 12, 1999, description of the beneficiary's duties that was provided with the petition, and argues that the AAO has previously found that a sole employee who manages a function may be eligible for classification as a manager or executive.

When managing or directing a function, the petitioner is required to establish that the function is essential and the manager is in a high-level position within the organizational hierarchy, or with respect to the function performed. The petitioner must demonstrate that the function is not directly performed by the executive or manager. Although counsel argues that the beneficiary controls an essential function, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. The record must further demonstrate that there are qualified employees to perform the function so that the beneficiary is relieved from performing non-qualifying duties. Absent details concerning the position descriptions and wages of subordinate or independent contract employees, as well as the company's managerial structure, the record fails to establish that the beneficiary will be managing rather than performing the function.

Counsel refers on appeal to an unpublished appellate decision in a case involving a petition submitted by a Japanese company where the beneficiary "supervised too few subordinates" but was "identified as the top senior level executive for an organization." In this case, the beneficiary is the sole employee of the U.S. entity and can hardly be considered to be at a senior level within an organizational hierarchy, other than in position title. Counsel has furnished no evidence to establish that the facts of the instant petition are in any way analogous to those in the cited AAO case. Moreover, an unpublished decision carries no precedential weight. See Chan v. Reno, 113 F.3d 1068, 1073 (9th Cir. 1997) (citing 8 C.F.R. section 3.1(g)). As the Ninth Circuit says, "[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." Id. (citing De Osorio v. INS, 10 F.3d 1034, 1042 (4th Cir. 1993)).

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Although the petitioner's descriptions are lengthy, they are also repetitive. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as analyzing the U.S. market for the foreign entity; being in charge of the direct operation of the U.S. company; reflecting and interchanging ideas to the Board of Directors and

stockholders; preparing business planning and marketing; setting goals for the new business, marketing, and product development; reinforcing and expanding business connections; ensuring that the market is always on top; creating sales, profits, and more jobs; "exercising wide latitude"; and making key corporate decisions, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as supervising and controlling the work of other supervisory and professional employees, having the authority to hire and fire employees, and having the authority to take personnel actions are of little significance considering the fact that the beneficiary is the sole employee and has never had any subordinate U.S. staff. The use of the position title of "vice president" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Further, the petitioner's evidence is not sufficient in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Although the U.S. entity was established in 1997, the beneficiary is the sole employee. The petitioner repeatedly makes reference to its intentions to hire additional staff and to commence doing business. However, Service regulations are exacting in requiring a new office to demonstrate its progress after the initial one-year period. 8 C.F.R. 214.2(l)(14)(ii). The petitioner was established nearly one and one-half years prior to the date the instant extension petition was filed.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will 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 petitioner has not established that the U.S. and foreign entities are doing business. As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

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.