



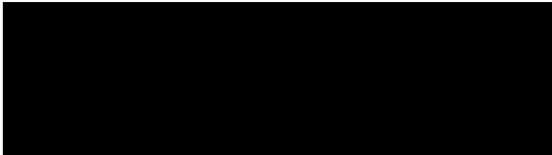
U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
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Washington, D.C. 20536



File: SRC 98 247 52139 Office: TEXAS SERVICE CENTER

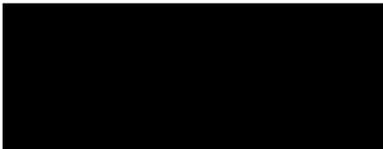
Date: DEC 19 2001

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:



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. Williams, Director  
Administrative Appeals Office

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

The petitioner is a retail store selling a variety of products. The petitioner seeks to employ the beneficiary in the United States as its vice-president. The director determined that the petitioner had not established it was doing business as an employer or that the petitioner needed an executive or manager. The director also determined that the petitioner had failed to demonstrate that the beneficiary's actual duties qualified him as a manager or executive and had failed to establish a qualifying relationship with the foreign entity.

On appeal, the petitioner disagrees with the director's determination and submits the petitioner's 1998 Internal Revenue Service Form 1120 for consideration.

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, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The United States petitioner is a company incorporated in June of 1995 in the State of Texas. The foreign entity in this case is a partnership of brothers created in December of 1982. The petitioner is requesting L-1A classification for the beneficiary as its vice-president.

The first issue in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

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 (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(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 petition was filed in September of 1998. The petitioner initially submitted with the petition its certificate of incorporation dated June 1995, its proposed organizational chart, an insurance policy and a lease agreement for physical premises in the United States that had expired in August of 1998. The petitioner also submitted its 1997 unaudited financial statement and Internal Revenue Service (IRS) Form 1120 for the years of 1995, 1996 and 1997. In addition, the petitioner submitted an affidavit from the beneficiary, indicating that the foreign entity, ██████████ & Brothers, was a partnership created in 1982. The affidavit indicated that the affiant owned 50 percent of the partnership and ██████████ owned the other 50 percent and that ██████████ was the manager of the partnership who handled the partnership in absence of the partners. The petitioner also submitted the import and export license of the foreign partnership as well as other documents demonstrating the membership of the partnership in various organizations in Pakistan. The petitioner also submitted an organizational chart for the foreign partnership indicating that the partnership had three partners.

The director requested additional evidence including the petitioner's current business lease, proof that the foreign partnership was doing business, proof of a qualifying relationship between the foreign and United States companies, the petitioner's business license and financial status and the petitioner's most recent IRS Forms, including the 1997 IRS Form 1120, Form 941 and W-2s.

In response, the petitioner submitted documents previously submitted with the petition. The petitioner also included a statement of extension of the business lease, and a stock certificate showing that ██████████ & Brothers owned 1,000 shares of the petitioner. The petitioner further submitted a certificate of good standing from the Texas comptroller of public accounts dated September 1998, and the petitioner's current (November 1998) bank statement.

The director determined that the petitioner had not established that it was doing business as an employer as required by 8 C.F.R. 214.2(l)(1)(ii)(G)(2). The director also focussed on the petitioner's 1997 IRS Form 1120 that indicated Mohammad T. Khan owned 100 percent of the petitioner. The director also noted information submitted with the petition that indicated the foreign partnership had three partners which contradicted the information provided in the beneficiary's affidavit. The director concluded from this information that the petitioner had failed to demonstrate that a qualifying relationship existed between the petitioner and the foreign entity.

On appeal, the petitioner submits its IRS Form 1120 for the year of 1998. Counsel for the petitioner explains that the affiliation between the foreign entity and the petitioner is very close.

Counsel indicates that two older brothers own the foreign entity and direct the United States company. Counsel also notes that because the younger brother is running the United States company, the family perceives that the younger brother owns the company, though technically this is not the case. Finally, counsel explains that the petitioner has not filed IRS Form W-2s or 941s because the petitioner pays its employee(s) in cash.

Counsel's assertions are not persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between 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). The qualifying relationship has not been established in the case at hand. There has been no explanation of the contradictory information about the number of partners that actually own the foreign entity. 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, counsel's assertion that the family's perception is that the younger brother owns the petitioner because he runs it, is not only contradicted in the record but is also evidence that the family defines ownership as it suits its purpose. The petitioner in filing its 1998 IRS Form 1120 continues to identify Mohammad T. Khan as the owner of the petitioner despite the acknowledgment of petitioner through its counsel that this is in error. Of further note, there is no evidence that Mohammad T. Kahn is one of the partners of the foreign entity. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980). 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).

Further, counsel's explanation that the petitioner did not file IRS Form W-2s or 941s because it paid its employees in cash, is not sufficient to establish that the petitioner has employees. Not only does this practice appear to be contrary to legitimate business practice the explanation of counsel cannot be used to evidence that the petitioner has employees. See Matter of Obaigbena, supra at 534.

On review, the record as presently constituted is not persuasive in demonstrating that a qualifying relationship exists between the petitioner and the foreign entity.

The second issue in this proceeding is whether the petitioner has established that the beneficiary has been or 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:

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

iii. 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 developing a marketing plan to expand the petitioner's business. The petitioner described the beneficiary's duties for the foreign entity as the managing director who oversees the operation of the company and directs and supervises degreed persons.

The director requested additional evidence on this issue to demonstrate that the beneficiary would be employed in a managerial or executive position for the petitioner.

In response, the petitioner submitted a statement reiterating that the beneficiary had been the managing director of the foreign entity and that the beneficiary would be the vice-president of the petitioner. The petitioner also submitted its proposed organizational chart.

On appeal, counsel indicates that the proposed organizational chart represents the plans of the foreign entity to expand the operations of the United States corporation. Counsel cites the regulations found at 8 C.F.R. 214.2(l)(1)(ii)(G)(2) that provide that a qualifying organization may be an organization that "is or will be doing business . . ." in the United States. Counsel asserts that though the petitioner already is doing business it is on a fairly small scale and even this is not required by regulation. Counsel further asserts that the stage of development of the company should be taken into account if staffing levels are used in making the determination for the L-1 classification.

Counsel accurately cites 8 C.F.R. 214.2(l)(1)(ii)(G)(2) but fails to show that the petitioner is doing business on a sufficient scale to support a managerial or executive position. The proposed organizational structure of the petitioner is insufficient to demonstrate that the beneficiary's job duties will be managerial or executive in nature. The chart simply clarifies that at the time of filing the petition and the response to the request for evidence by the director the beneficiary was not eligible for the L-1 classification. The chart demonstrates that the beneficiary will be required to provide services to the petitioner that are not of a managerial or executive nature. 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).

In addition, the petitioner has not provided a comprehensive description of the beneficiary's job duties for the foreign entity or the petitioner. The meager description provided essentially paraphrases one or two of the elements found in the regulation.

Given the indefinite description of the beneficiary's job duties for the foreign entity and the petitioner, the petitioner has not established that the beneficiary has been employed or will be employed in a primarily managerial or executive capacity.

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.