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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

PUBLIC COPY



DEC 12 2008

FILE: LIN-01-242-51124 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for 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 identity 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 Citizenship and Immigration Services (CIS) 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, Nebraska 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.

Petitioner is engaged in the restaurant and catering business in which it provides Pakistani cuisine. The petitioner seeks to temporarily employ the beneficiary as president of its organization, formed in the year 2000, at an annual salary of \$40,000. The petitioner filed a petition, which was denied by the director. The director concluded that the petitioning business and the foreign company are not qualifying organizations, and that the size of the United States investment was insufficient to execute the petitioner's business plan.

Counsel filed a Notice of Appeal and submitted a letter requesting a motion to reconsider. The director declined to treat the appeal as a motion and forwarded the matter to the AAO for review. 8 C.F.R. § 103.3(a)(2)(iii). In the letter counsel addressed only one issue raised in the director's decision, which pertained to the petitioner's failure to respond with supporting documentation to the director's notice of intent to deny. Counsel indicated that the additional evidence was submitted one day late, and requested that the director reconsider the his decision. On appeal, counsel did not submit any other evidence in support of a qualifying relationship between the U.S. and foreign companies, or substantiating the size of the U.S. investment.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. 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(1)(3) further 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.

(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.

Further, the regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) sufficient physical premises to house the new office have been secured;
- (B) the beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;
- (C) the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

- b. the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
- c. the organizational structure of the foreign entity.

The first issue the AAO will address is whether the United States company and foreign partnership are qualifying organizations.

The pertinent regulations at 8 C.F.R. § 214.2(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *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.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *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.

(L) *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.

In the present case, the petitioner declared the stock ownership and managerial control of the two entities as follows:

Petitioning company:

Mirza N.A. Khan	51%
Asra Ahmed	40%
Zareen Bano	09%

Foreign partnership:

Mirza N.A. Khan	60%
Zareen Bano	40%

Stock certificates from the petitioning company were provided as proof of ownership by the three individuals. In addition, the petitioner submitted the partnership agreement reflecting the proportion of ownership in the foreign entity as listed above.

The record supports a finding that the U.S. company and foreign business are affiliates, as defined in the regulations. 8 C.F.R. § 214.2(l)(ii)(L). The evidence submitted by the petitioner establishes that Mirza N.A. Khan owns a majority share in both entities, and likewise, controls each. As affiliates, the foreign and U.S. entities satisfy the requisite qualifying relationship. Therefore, the director's decision on this issue will be withdrawn.

The second issue in this proceeding is whether the size of the United States investment will support the company doing business.

The regulations require that the U.S. operation, as a new office, provide information, including the size of the

investment, as evidence that within one year it will support a managerial or executive position. 8 C.F.R. § 214.2(l)(3)(v). In response to the director's request for evidence on this issue, the petitioner declared that the initial investment in the U.S. venture was \$50,000. The petitioner further stated that it "will also raise funds to fund its expansion effort by obtaining credit from banks and through additional capital infusions from its members." A copy of a business checking account verification was provided, which reflected a balance of \$50,000. The account was registered in the name of one of the minority shareholders in the U.S. organization. The account verification also indicated a savings account balance of \$50,000.

On appeal, counsel submitted an additional account verification, a bank letter, a letter from the petitioner's accountants, and a notarized statement from the nine percent shareholder of the petitioning organization. The account verification, again titled in the name of the shareholder rather than the business, reflected a checking account balance of \$75,003.05. In a notarized statement, the nine percent shareholder stated an intention to transfer \$15,000 into the business account in two months. The bank letter indicated that the forty percent shareholder held available funds of approximately \$64,000 in her personal checking account. Lastly, the petitioner's accountants stated in a letter that they believed "[the petitioner's] current resources are adequate to successfully start and run this restaurant. They have liquidity for their capital equipment needs and working capital needs."

The record does not establish that the size of the investment is sufficient to commence doing business. There are several inconsistencies that support this finding. First, both account verifications provided by the petitioner are titled in the name of a minority shareholder rather than the business itself. Comments on both verifications indicate that the checking account is for a business; however, a discrepancy exists as to the actual owner of the funds. The petitioner failed to submit any information as clarification. 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, 591-92 (BIA 1988). Also, because the petitioner failed to submit any account statements titled in the name of the business, there is no evidence that the petitioning organization was actually

established with \$50,000, as referred to by the petitioner in its response to the director's request for evidence. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner also submitted a notarized statement from one of the minority shareholders in which he promised to transfer \$15,000 into the business account in two months. The shareholder's intention to transfer money at a future date holds no weight in establishing the financial size of the U.S. operation. First, the statement is unsupported by any evidence, such as an account statement, that the shareholder actually possesses \$15,000 to transfer to the petitioner. Second, the shareholder, in his notarized statement, stated that the contribution is "in accordance with the capital requirements set forth [in the operating agreement.]" The operating agreement indicates only that the managing member may request additional contributions. As there is no language in the agreement requiring the minority shareholder to make additional contributions, and no ancillary agreement has been shown to exist, the shareholder's future contribution of \$15,000 is not guaranteed. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190, 193-94 (Reg. Comm. 1972).

Further, the account verification, bank letter, and the shareholder's commitment to contribute additional monies refer to dates that are subsequent to the date of filing the petition. Both the account verification and the bank letter are dated January 23, 2002 and January 24, 2002, respectively. This is approximately five months following the filing date. In addition, the shareholder's notarized statement was made on January 21, 2002. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, the documents submitted by the petitioner reflecting dates subsequent to the filing of the petition are irrelevant in establishing the financial status of the organization.

For the foregoing reasons, the AAO cannot find that the size of the U.S. operation is sufficient to support the company doing business.

Beyond the decision of the director, the record does not establish that within one year of the approved petition the beneficiary will be functioning in a primarily managerial or executive capacity. The petitioner noted that some of the beneficiary's responsibilities would include supervising key employees, forging alliances with suppliers and distributors, networking with foreign customers to obtain large orders, negotiating with local catering companies and banquet halls, and establishing key ties and agreements with large customers. These job duties indicate that the beneficiary will be primarily performing the tasks necessary to provide the product or service of the company, rather than actually managing or supervising the performance of such. 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, although the petitioner anticipates hiring managers, assistant managers, head chefs, and several other employees to work in the kitchen, the evidence supports a finding that the beneficiary will only be working as a first-line supervisor, rather than a manager or executive, as defined in the regulations. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Id.* at 604. There is no indication that the beneficiary will manage the day-to-day operations of an activity of the organization. As the appeal will be dismissed for the foregoing reasons, this issue need not be further addressed.

An additional issue not considered by the director is whether the beneficiary, as a major stockholder in the U.S. organization, will be employed for a temporary period in the United States. The regulation at 8 C.F.R. § 214.2(1)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. Again, as the appeal will be dismissed on other grounds, this issue need not be considered further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.