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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

FILE: LIN-03-051-52746

Office: NEBRASKA SERVICE CENTER

Date: **DEC 17 2003**

IN RE: Petitioner:
Beneficiary:

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:

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.

The petitioner is located in the United Kingdom and provides design and marketing services to the travel and leisure sector. The petitioner has incorporated a new office in Denver, Colorado, in which it seeks to temporarily employ the beneficiary as a creative director. As such, the petitioner filed a petition seeking to classify the beneficiary as an intracompany transferee to be employed in the United States from October 2002 through October 2009.

In a decision dated February 13, 2003, the director denied the petition stating that the foreign and U.S. entities are not qualifying organizations. The director based this on his finding that the foreign operation is owned by the beneficiary as a sole proprietorship. The director concluded that a sole proprietorship, unlike a corporation or partnership, could not file a petition for its owner because "there is no separate entity able to continue business operations abroad while the beneficiary transfers to the U.S. entity."

In a timely appeal, the petitioner asserted that the foreign operation should not be considered a sole proprietorship because, although operating as such since inception, the beneficiary had also incorporated the business at the time it was established. The petitioner admits that since the business started it has been functioning as a sole proprietorship, yet claimed that, just prior to filing the L-1 petition, the corporation, which had remained "essentially dormant," was "reactivated and became the repository for . . . the business." Therefore, as counsel for the petitioner asserts, contrary to the director's finding, a separate foreign legal entity would exist during the beneficiary's employment in the U.S. company.

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.

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:
 - (1) the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) 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
 - (3) the organizational structure of the foreign entity.

The AAO will address the issue of whether the foreign operation and the United States company 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 petition, the petitioner identified the U.S. entity as an affiliate of the foreign business. The beneficiary was named as the sole owner of the foreign petitioner, and identified the petitioning business as a sixty percent shareholder of the U.S.

company.¹ Several relevant documents were submitted with the petition including, Articles of Incorporation of the U.S. company, a license agreement between the petitioner and the U.S. company, an operating agreement, the business plan of the U.S. entity, and a loan agreement between the petitioner and U.S. organization.

In a notice dated December 13, 2002, the director requested additional evidence in regards to the beneficiary's role as a manager or executive. In response, the petitioner provided, among other things, organizational charts for both the U.S. and foreign businesses, and a letter and an affidavit from the beneficiary testifying as to his ownership and responsibilities in both businesses.

In her decision, the director concluded that the beneficiary is the sole proprietor of the foreign petitioning entity. In making this determination, the director highlighted several statements in the documents of record, including a letter from the petitioner's accountant, in which the accountant stated that "[the petitioning entity] is an unincorporated business in the UK, established as a sole-tradeship," and a letter signed by the beneficiary in which he indicates that he is the sole owner of the company. The director further determined that because a sole proprietorship is not a separate legal entity, it can not file a petition on behalf of its owner as there would be no one to continue operations abroad while the beneficiary is employed in the United States.

On appeal, the petitioner's counsel submitted a brief in explanation of the operating status of the foreign business. Counsel explained that the beneficiary first incorporated his business in the UK in 1988, and roughly two years later changed its name. Since 1990, the beneficiary operated under the new name "while his corporation with the same name remained essentially dormant." In November 2002, prior to filing the L-1 petition, the corporation created by the beneficiary in 1990

was reactivated and became the repository for [the business]. The assets transferred in this action included the substantial good will of the business, all accounts receivable, pending contracts, equipment and the building purchased and restored specifically for the business. Also as part of this reactivation,

¹The remaining forty percent is owned by the beneficiary's son, who is a U.S. citizen.

100 shares of corporate stock was [sic] issued representing the net value of the business holdings .

. . .

Therefore, counsel asserts that the petitioning operation should be considered a corporation separate from its owner, the beneficiary.

On review, the record does not establish that the foreign business and the U.S. company are qualifying organizations as defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G). Throughout the record the petitioner is referred to as a sole proprietorship. In the license agreement between the petitioner and the U.S. company, dated August 28, 2002, the petitioner is named as a "sole proprietorship which is wholly owned by [the beneficiary]." In the operating agreement, also dated August 28, 2002, the petitioner is again referred to as a sole proprietorship. As already cited by the director, the petitioner's accountant also made reference to the petitioner as such. In a letter from the accountant, dated January 17, 2003, the accountant explains, in pertinent part, the following:

As set out in our earlier submission to you, [the petitioner] is an unincorporated business in the UK, established as a sole-tradeship. In other words [the beneficiary] is 100 per cent owner. He also has sole control over the business on a day-to-day basis and reports to no other individual or corporation. All managerial and executive decision-making capacity is vested in him. He occupies what would be termed the role of CEO from a US viewpoint.

For the record, please be aware that since November 2002 a separate limited company, incorporated in England, [], has commenced trading in the UK. [The beneficiary] is 100 percent owner of the issued share capital (stock) of that company, he is the director and he occupies an executive role for the company that is equivalent to what would be termed CEO in the United States.

Further, in an affidavit dated January 7, 2003, which is after the petitioner's subsequent incorporation, the beneficiary himself stated that he is the sole owner of the petitioning business. He further described the U.S. company as a subsidiary of the foreign business.

The record contains many inconsistencies as to the claimed type of organization. Petitioner's counsel explained that the petitioning entity has operated as a sole proprietorship, but just recently reassumed its status as a corporation. Throughout the record, both the petitioner and counsel claim there are two entities: the petitioner as a sole proprietorship and the petitioner as a company. Yet, neither made an exact distinction between the two, except to say that each exists. If both businesses exist, it is not clear from the record which operation is a party to the license and operating agreements. Although both agreements identify "a proprietorship" as a party to the agreement, counsel and the petitioner appear to use the terms proprietorship and corporation interchangeably. Most importantly, the petitioner does not clearly specify which business is a sixty percent shareholder in the U.S. company, the petitioning sole proprietorship or the foreign company.

It is impossible to determine from the record the relationship between the three claimed entities. The petitioner has created further confusion by making two conflicting notation: first, that the U.S. company is an affiliate; and, second, that the U.S. company is a subsidiary of the overseas business.² 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). The AAO cannot conclude that the requisite qualifying relationship exists between the foreign and U.S. entities, and therefore, the appeal will be dismissed.

Another inconsistency exists in that the foreign operation is the named petitioner on the petition. In *Matter of A. Dow Steam Specialities, Ltd.*, the Commissioner held that a foreign-based company, which has not been shown to be doing business in the United States, could not petition for a beneficiary, as there was no U.S. corporation in which to employ the beneficiary. 19 I&N Dec. 389 (Comm. 1986) (in immigrant visa proceedings). It concluded that while a U.S.-based branch, subsidiary, or affiliate of the foreign company could file the petition, the foreign company itself may not. See *id.* at 390. In the present case, the petitioner is the foreign UK operation, not the U.S.

² The petitioner noted on the petition that the U.S. company was an affiliate of the foreign operation, yet later stated in an affidavit, dated January 7, 2003, that it was a subsidiary.

corporation. As the U.S. company did not petition for the employment of the beneficiary, the petition will be denied.

The AAO will now address the issue of whether the petitioner, as a sole proprietorship in the United Kingdom can continue doing business after the beneficiary is transferred to the United States.

The phrase "*doing business*" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization." 8 C.F.R. § 214.2 (1)(1)(ii)(H).

In regards to this issue, the petitioner, in a letter submitted as additional evidence, described the UK company as a "long established and successful company, with a solid info-structure [sic] and management." As such, the petitioner claimed that it would not be necessary for the beneficiary to devote the majority of his time to the ongoing success of the company. Petitioner's counsel, in a brief submitted on appeal, also explained that the petitioner, a recognized world leader in the area of designing travel and tourism materials, employs ten full-time employees and numerous freelance contractors on an as needed basis. It is through the two directors that the operation "does most of its clients' work with [the beneficiary] overseeing the operations." Counsel asserts that the UK operation is designed to continue in the beneficiary's absence.

The record supports a finding that the foreign entity is operating as a business separate from the beneficiary. It may reasonably be concluded that the petitioner will continue to do business as a design and marketing company while the beneficiary is employed in the United States. The petitioner employs a design director and a production director, both of whom will oversee the freelance contractors, designer and picture researcher, project heads, and designers of the organization, and manage the daily business operations. As the appeal will be dismissed, this issue need not be further addressed.

Beyond the decision of the director is the issue of whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44), or that the petitioner would support such a position within one year of approval of the petition. Upon review of the record, the petitioner has not established that the beneficiary will perform primarily managerial or executive functions while employed in

the United States. As the appeal will be dismissed on the grounds discussed above, this issue 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.