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U.S. Department of Homeland Security
Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
CIS, AAO, 20 Mass, 3/F
425 I Street NW
Washington, DC 20536



DEC 23 2003

FILE: WAC 02 038 51434 Office: CALIFORNIA SERVICE CENTER Date:

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

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 disclosure of unwarranted
invasion of personal privacy

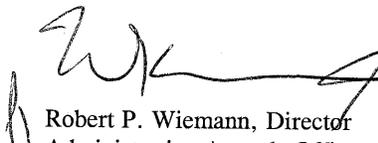
INSTRUCTIONS:

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 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, 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, Wayne Thompson Fine Minerals LLC, claims that it is an affiliate of Thompson-Iqbal Partnership, a Pakistani organization.¹ The petitioner describes itself as a "fine mineral dealer." The U.S. entity was incorporated as a limited liability company in the State of Arizona on May 18, 2000. The petitioner now seeks to hire the beneficiary as a new employee. Consequently, on November 9, 2001, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's "director/manager of operations" at an annual salary of \$100,000.

The director denied the beneficiary's nonimmigrant petition because: (1) the petitioner failed to submit documentation in response to a request for evidence; (2) the beneficiary will not be primarily serving as a manager or executive for the U.S. entity; and (3) the petitioner demonstrated no qualifying relationship with the Pakistani company.

On appeal, the petitioner asserts that: (1) a qualifying relationship exists between the U.S. entity and the Pakistani company; and (2) the beneficiary will serve in an executive or managerial capacity for the U.S. entity.

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.

¹ The petitioner did not describe its purported relationship to the overseas entity on Form I-129; instead, in an October 28, 2001 letter, the petitioner initially identified its claimed relationship to the Pakistani organization.

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 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

When the petitioner initially filed its Form I-129, Petition for a Nonimmigrant Worker, the U.S. entity failed to provide the following requested information about the beneficiary:

- Name and address of employer abroad.
- Dates of alien's employment with this employer.
- Description of the alien's duties for the past three years.
- Description of the alien's proposed duties in the United States.

Additionally, the petitioner did not identify the U.S. company's relationship with the Pakistani organization as a parent, branch, subsidiary, affiliate, or joint venture.

Subsequently, on November 19, 2001, the director issued a request for evidence. The director sought documents regarding the beneficiary's employment abroad:

EMPLOYMENT ABROAD: Submit the following evidence to establish that the beneficiary has the requisite one year continuous employment abroad within the three years preceding the time of filing the present petition.

- **PAYROLL RECORDS:** Present copies of the foreign company's payroll records pertaining to the beneficiary for the year preceding the filing of the first petition for L-1 status. Specify when the beneficiary was hired, the positions that were held

QUALIFYING RELATIONSHIP: Submit the following evidence to establish that the foreign and U.S. company have a qualifying relationship :

- **ANNUAL REPORT:** Submit a copy of the foreign company's annual report that lists all affiliates, subsidiaries, and branch offices, and percentage of ownership.
- **ARTICLES OF INCORPORATION/ORGANIZATION:** Submit a filed or endorsed copy of the foreign company's articles of incorporation or organization[.]

MANAGER OR EXECUTIVE: Submit the following evidence to establish that the beneficiary has been performing the duties of a manager or executive with the foreign company:

- **FOREIGN COMPANY'S ORGANIZATIONAL CHART:** Submit a copy of the foreign company's line and block organizational chart describing its managerial hierarchy and staffing levels. The chart should include the current names of all executives, managers, supervisors, and number of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also, include a brief description of job duties . . . for all

employees under the beneficiary's supervision.
(Emphasis in original.)

DOING BUSINESS: Submit the following evidence to establish that the foreign company is a valid business entity: [A] copy of the foreign entity's income tax return for the last year [and] a copy of the foreign entity's financial statement including balance sheet and income statement for the last year.

Additionally, the director sought documents regarding the U.S. business:

QUALIFYING RELATIONSHIP: Submit the following evidence to establish that the U.S. company and foreign company have a qualifying relationship . . . : [A] list of all partners or owners of the U.S. entity and percentage of ownership [and] a copy for Form 1065 [including] Schedule[s] A, K and K-1 showing percentage of ownership and capital investment.

MANAGER OR EXECUTIVE: Submit the following evidence to establish that the beneficiary has been or will be performing the duties of a manager or executive with the U.S. company:

- **U.S. BUSINESS ORGANIZATIONAL CHART:** Submit a copy of the U.S. company's line and block organizational chart describing its managerial and staffing levels. The chart should include the current names of all executives, managers, supervisors, and numbers of employees within each department or subdivision. Clearly identify the beneficiary's position in the chart and list all employees under the beneficiary's supervision by name and job title. Also include a brief description of job duties . . . under the beneficiary's supervision. (Emphasis in original.)
- **BUSINESS LICENSES:** Submit copies of the U.S. company's current valid business licenses

Finally, the director asked the petitioner to submit its bank statements for the past six months as well as a completed "L Classification Supplement to Form I-129."

The petitioner failed to provide the requested documentation. For example, the petitioner provided no payroll records, annual

reports, articles of incorporation, tax returns, financial statements, or organizational charts of the overseas entity. Similarly, the petitioner did not supply a list of owners or partners, Form 1065 with Schedules A, K and K-1, organizational charts, or business licenses for the U.S. entity. "Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition." 8 C.F.R. § 103.2(b)(14). Additionally, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. See generally *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation); *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation).

The evidence that the petitioner failed to submit was material because it could have established the U.S. entity as an affiliate, subsidiary, or branch of the overseas entity; moreover, the evidence could have demonstrated that the beneficiary served in a primarily managerial or executive position abroad and would do so in the United States. Therefore, given the petitioner's failure to submit material evidence, the director properly denied the petition.

Despite the lack of evidence, the petitioner asserts that it is a qualifying organization because it is an affiliate of a Pakistani company. The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(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 operation 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.

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*, 19 I&N Dec. 593, 595 (Comm. 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. *Matter of Church Scientology International, supra.*

The evidence which the petitioner supplied did not address the question of whether the U.S. and overseas entities present an affiliate relationship. Specifically, the petitioner submitted its articles of organization; however, the articles make no mention of any owners other than Wayne A. Thompson. Furthermore, the petitioner submitted the beneficiary's recent bank account statements as well as miscellaneous photocopies of checks and wire transfers payable to the beneficiary. The petitioner did not explain, however, how the bank statements, checks, and wire transfers established a qualifying relationship between the U.S. and overseas entities. The record contains no lists of shareholders in either the U.S. or Pakistani entity. The failure to submit adequate supporting documentary evidence does not meet the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In sum, given the lack of evidence in the record, the petitioner cannot demonstrate that it is affiliated with a Pakistani company.

The petitioner's March 8, 2002 appeal letter states that the U.S. entity is affiliated with Global Mining Enterprises in Pakistan. The petitioner's October 28, 2001 letter states, however, that the U.S. entity is affiliated with Thompson-Iqbal Partnership in Pakistan. The March 8 letter offered no explanation for this inconsistency. 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). This inconsistency, therefore, further supports the director's finding of no qualifying relationship.

The AAO now turns to the question of whether the beneficiary has been or will be serving in a primarily managerial or executive capacity for the U.S. entity. 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, CIS will look first to the petitioner's description

of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

As previously noted, the petitioner did not describe the beneficiary's proposed U.S. job duties on Form I-129. The petitioner's October 28, 2001 letter stated:

[The beneficiary] will be managing the mineral extraction and growth component of the corporation.

* * *

[The beneficiary's] knowledge and expertise along with his international contacts should grow the U.S. affiliated organization into a multi-million dollar enterprise.

* * *

[The beneficiary] will analyze business operating procedures increasing the efficiency in the U.S. company. As an Operations Manager or Director of Operations, his duties will include: directing and coordinating the mining and transportation of the minerals, as well as the related operations and organizational policy and procedures. He will direct and coordinate the activities of the operations department which may be a salaried or on an independent contractor basis. He will review and analyze expenditures, review and analyze all financial and operation reports to determine the requirements for increasing profits; expansion of existing mining operations in Asia and other countries throughout the world and will determine when new equipment should be purchased. His position will require frequent travel throughout the world to meet with financial organization[s], vendors and potential clients.

The March 8, 2002 appeal letter added:

[The beneficiary's] job duties as the Director of International Marketing and Management will be to research specific market conditions in Pakistan to

determine current and potential sales of [the petitioner's] product, sales and services relating to the sale of semi[-]precious and other materials. He will also be responsible for establishing research methodology and design format for data gathering This data will be invaluable to the company's continued and future dealings in the United States and Pakistan markets. [The beneficiary] will be responsible for gathering data on competitors and analyze prices, sales and methods of marketing and distribution. These are duties in addition to the management of all of the functions relating to the geological exploration, mining and processing of semi-precious and other materials. He will collect and maintain data on customer preferences and buying habits which will lead to increased sales in this market.

The duties listed above typify marketing tasks or tasks necessary to produce a product or provide services; therefore, the beneficiary cannot be considered to be employed in a primarily managerial or executive capacity. *Matter of Church Scientology*, 19 I&N Dec. 593, 604 (Comm. 1988). For example, the petitioner admitted that the beneficiary will be researching specific market conditions in Pakistan to determine current and potential sales of the petitioner's products. Moreover, the beneficiary will be gathering data on competitors as well as analyzing prices, sales and methods of marketing and distribution. Finally, the beneficiary will collect and maintain data on customer preferences and buying habits. Therefore, the director correctly determined that the beneficiary's job duties would be neither managerial nor executive.

Additionally, the job descriptions are vague in that they fail to convey an understanding of the beneficiary's proposed daily duties. For instance, the petitioner did not explain what "managing the mineral extraction and growth component" means. Similarly, the petitioner failed to define what analyzing business operating procedures to increase the efficiency in the U.S. company would entail. Furthermore, the petitioner did not specify the tasks involved in "directing and coordinating the mining and transportation of the minerals, as well as the related operations and organizational policy and procedures." As previously set forth, the failure to submit adequate supporting documentary evidence does not meet the burden of proof in these proceedings. *Matter of Treasure Craft of*

California, supra. In sum, the beneficiary's proposed duties for the U.S. entity fail to qualify as primarily managerial or executive.

Beyond the decision of the director, the AAO turns to the question of whether the beneficiary served at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition and whether the prior year of employment abroad was in a managerial, executive or involved specialized knowledge position. See 8 C.F.R. § 214.2(l)(3)(iii), (iv). As explained earlier, the petitioner did not provide payroll records or organizational charts of the overseas entity. Thus, a lack of evidence precludes the AAO from finding that the beneficiary served abroad in an executive or managerial capacity.

Also, beyond the decision of the director, the AAO notes further inconsistencies in the evidence which detract from the petition's credibility. First, the October 28, 2001 letter describes the beneficiary's job title as "an Operations Manager or Director of Operations." In contrast, the March 8, 2002 appeal letter identifies the job title as "Director of International Marketing and Management." The petitioner offered no explanation to resolve this inconsistency. Second, the Form I-129 states that the petitioner plans to pay the beneficiary \$100,000 per year; however, the March 8, 2002 appeal letter claims that the petitioner will pay the beneficiary \$96,000 per year. The petitioner did not explain the discrepancy in proposed wages. 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.* The inconsistencies in reported job titles and proposed wages further support the director's denial of the petition.

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.