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

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536

[Redacted]

FILE: SRC 02 113 54169 Office: TEXAS SERVICE CENTER Date:

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

MAY 06 2003

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)

PUBLIC COPY

ON BEHALF OF PETITIONER:  
[Redacted]

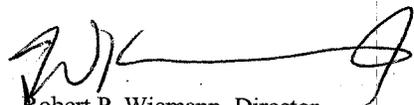
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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, Texas 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, [REDACTED] Inc. claims that it is an affiliate of [REDACTED] an Indian partnership. The petitioner is a convenience store which sells food, beverages, and gasoline in Tennessee. The U.S. entity was incorporated in the State of Tennessee on January 2, 1996. The petitioner now seeks to hire the beneficiary as a new employee.<sup>1</sup> The U.S. entity, therefore, is petitioning the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for one year. The petitioner seeks to employ the beneficiary as the U.S. entity's managing director at an annual salary of \$36,000.

The director denied the beneficiary's nonimmigrant petition because the petitioner is neither an affiliate nor a subsidiary of the Indian company. The petitioner submitted a brief to the director captioned "Motion to Reconsider and Reopen." In accordance with 8 C.F.R. § 103.3(a)(2)(iv), the director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner contends that the U.S. entity is an affiliate of the Indian company and asserts that the Bureau should classify the beneficiary as a nonimmigrant intracompany transferee.

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

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<sup>1</sup> The evidence submitted inconsistently describes the claimed beneficiary as [REDACTED]

[REDACTED] and "Mr. [REDACTED] Although these inconsistencies detract from the credibility of the petition, the names all appear to refer to the same individual.

subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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 with 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.

On appeal, counsel claims the petitioner is an affiliate of the Indian partnership. The pertinent regulations at 8 C.F.R. § 214.2(1)(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 petitioner submitted Form I-129 on February 26, 2002. The submission included several documents pertinent to the qualifying relationship issue. On July 2, 2002, the director issued a request for evidence. In response, the petitioner resubmitted essentially the same documents on the qualifying relationship issue as it had in February 2002. The documents on both occasions included:

- The Indian entity's February 18, 2000 Partnership Deed identifying the shareholders:

Owner	Share
[REDACTED]	25%
[REDACTED]	15%
[REDACTED]	10%
[REDACTED]	20%
[REDACTED]	15%
[REDACTED]	15%

- The U.S. entity's charter incorporating the petitioner on January 2, 1996 and authorizing issuance of 2,000 shares of common stock.
- The U.S. entity's stock certificates one through nine and the January 1, 2001 stock purchase agreement indicate that, as of February 26, 2002, six persons held a total of 100 shares of the petitioner's stock in the following percentages:

Owner	Share
[REDACTED]	25%
	15%
	10%
	10%
	20%
	15%
	5%

As the above percentages demonstrate, the petitioner's ownership structure does not comply with 8 C.F.R. § 214.2(1)(1)(ii)(L)(2); that is, the same group of individuals does not own and control approximately the same share or proportion of the Indian and U.S. companies. Specifically, only [REDACTED]

[REDACTED] and [REDACTED] share ownership in each company. Therefore, even though three common shareholders hold the same percentages in each the company, the petitioner has not established an affiliate relationship between the U.S. and Indian entities.

On appeal, counsel cites *Sun Moon Star Advanced Power, Inc. v. Chappell*, 773 F.Supp. 1373 (N.D.Cal. 1990), as support for petitioner's position. *Sun Moon Star* raised the questions of whether, under 8 C.F.R. § 214.2(1)(1)(ii)(L), a corporation can qualify as an "individual" or indirect ownership may demonstrate an affiliate relationship. The question here is whether the same individuals own stock in essentially the same proportions in each entity. The AAO acknowledges that the stock owners in both entities may share a familial relationship; nevertheless, as previously explained, only three persons share ownership in the same percentages in the U.S. and Indian entities. Therefore, even under the broadest interpretation of the regulations, an affiliate relationship does not exist here.

Additionally on appeal, counsel relies upon *Matter of Tessel, Inc.*, 17 I&N Dec. 632 (Acting Assoc. Comm. 1981). The facts in the instant case are unlike those in *Tessel*. In *Tessel*, the beneficiary owned 93 percent of the foreign company and 60 percent of the U.S. company; thus, he demonstrated effective control over both the foreign and U.S. entities. *Tessel* at 633. There is no such "high percentage of common ownership," as *Tessel* requires, present in this case. *Id.* As the charts above reveal, no one person controls a majority of both Shree Ambica Marketing and M.P.A. Corporation. Thus, the petitioner cannot establish an affiliate relationship pursuant to *Tessel*.

Additionally, beyond the decision of the director, the AAO notes that the petitioner has failed to demonstrate that the beneficiary was employed in an executive or managerial capacity for one continuous year in the three year period preceding the filing of the petition and that the proposed employment involved executive or managerial authority of the new operation. See 8 C.F.R. § 214.2(1)(3)(v)(B). Specifically, the Form I-129 reported the beneficiary's foreign duties as:

Manage sale force in the hiring and firing of field sales; develop and implement policies; monitor financial statements to evaluate goals so that they are in line with business plan; manage day-to-day operations of sales force by reviewing plans and objectives and leading sales staff to optimize selling strategies in order to maximize profit. Managing of start-up of new company.

The Form I-129 described the beneficiary's proposed U.S. activities as:

Oversee the day-to-day management including directing and coordinating activities within the organization to obtain efficiency and economy. Plan and develop policies and procedures; ensure a strategic plan and business are set and monitored; maintain finance and accounting in the payables and receivables and payroll; establish yearly budgets and set goals accordingly; hire and fire subordinates; supervising personnel in the policies and procedures for safety and customer satisfaction; advertis[ing] campaigns; market products that are in high demand; search for property for the expansion of company and report findings to other shareholders.

The duties listed above typify 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). Instead, the beneficiary's duties appear to be those of a first-line supervisor. See 8 C.F.R. § 214.2(1)(1)(ii)(B)(4).

The February 2, 2002 and September 26, 2002 letters, which the petitioner submitted as evidence, further demonstrate that the beneficiary will be serving as a first-line supervisor rather than as a manager or executive. For example, the first responsibility, which the February 2 letter lists, admits that the beneficiary will be in charge of "day-to-day management of operations" of a gas and convenience store. The February 2 letter indicates that the beneficiary's duties will include marketing which, by definition, qualifies as performing a task necessary to provide a service or produce a product. Additionally, according to the February 2 letter, the beneficiary's duties will include such production-oriented activities as "generat[ing] accounts payable checks," "compil[ing] data for monthly financial statements," and "arrang[ing] for payroll services."

An organizational chart included with the September 26 letter reveals that the beneficiary will be sharing first-line supervision of four non-professional employees, namely, a store manager, front desk clerk, back room clerk, and stocking clerk. Finally, the petitioner's evidence "failed to document what proportion of [the beneficiary's] duties would be managerial/executive functions and what proportion would be non-manager/non-executive." See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); see also *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999). In sum, the beneficiary's duties appear to be those of a first-line supervisor of non-professional employees rather than those of a manager or executive. A first-line supervisor of non-professional employees is not considered to be acting in a managerial capacity merely by virtue of the supervisory duties. 8 C.F.R. § 214.2(l)(1)(ii)(B)(4).

Moreover, the AAO notes that the job descriptions are vague in that they fail to convey an understanding of the beneficiary's daily duties abroad and proposed day-to-day responsibilities in the United States. 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). Therefore, neither the beneficiary's overseas duties nor his proposed U.S. responsibilities qualify as primarily managerial or executive.

The evidence, which the petitioner submitted, raises one further issue beyond the decision of the director. The petitioner

apparently asserts that his proposed U.S. duties will be executive or managerial because the petitioner plans to open at least two more convenience stores. The beneficiary will manage the additional stores in addition to the original one. The record demonstrates, however, that at the time the petition was filed, the U.S. entity operated only one store. The Bureau may not, however, approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Therefore, the future store openings have no bearing on whether the beneficiary's proposed duties qualify as primarily managerial or executive. However, as the appeal will be dismissed on the grounds discussed, issues as to whether the beneficiary's duties have been or will be primarily managerial or executive need not be addressed 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; 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 petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed.

