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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: WAC 02 032 57407 Office: CALIFORNIA SERVICE CENTER Date: NOV 21 2003

IN RE: [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:



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 nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is described as a construction business. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the evidence submitted by the petitioner was not sufficient to establish that a qualifying relationship existed between the U.S. and foreign entities as defined in the regulations. The director also concluded that the evidence did not demonstrate that the beneficiary's duties involved responsibilities that were primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's determination and asserts that the record demonstrates a qualifying relationship between the U.S. entity and the foreign entity and that the beneficiary's duties have been and will be managerial or executive in nature.

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.

The regulation at 8 C.F.R. § 214.2(1)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity

that is managerial, executive or involves specialized knowledge.

The regulation at 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.
- (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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 1998 as a construction business. The petitioner states that the U.S. entity is a subsidiary of Zhanet Keshishyan. The petitioner declares one employee. The petitioner seeks to continue the beneficiary's services as its president at a yearly salary of \$32,000.

The regulation at 8 C.F.R. § 103.2(b)(8) states in regard to a request for evidence:

[E]xcept as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or ineligibility is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding

eligibility, the Service shall request the missing initial evidence, and may request additional evidence, In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period the applicant or petitioner may:

- (i) Submit all the requested initial or additional evidence;
- (ii) Submit some or none of the requested additional evidence and ask for a decision based on the record; or
- (iii) Withdraw the application or petition.

The petition in this case was filed on October 26, 2001. Subsequent to the filing of the petition, the director determined that the petitioner had submitted insufficient evidence to establish the beneficiary's eligibility as an intracompany transferee. In a notice dated December 20, 2001, the director requested additional evidence to overcome the deficiencies. In that notice the petitioner was informed that it had 12 weeks, until March 14, 2002, in which to respond to the director's request. In a letter dated March 12, 2002, counsel for the petitioner requested additional time (90 days) to prepare a response to the director's request, noting that the petitioner was finding it difficult to obtain documents from the Internal Revenue Service (IRS) in a timely fashion. On May 7, 2002 the director rendered a decision denying the petitioner's petition for extension of stay under the L-1A classification.

On June 3, 2002, counsel submitted a brief and evidence in support of the petitioner's appeal of the director's decision. The evidence consisted of articles of incorporation for the U.S. entity, company invoices, company tax records, company bank records, and business documents from the parent company. The record reflects that the majority of the company documents were in existence prior to the director's request for additional evidence and prior to the director's decision.

Where the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition is adjudicated, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The petitioner's evidence presented on appeal will not be

considered and the record as presently constituted will be reviewed.

The first issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the foreign and U.S. entities.

On appeal, counsel claims the petitioner is a subsidiary of the foreign entity, and that the evidence submitted establishes that a qualifying relationship exists between the U.S. and foreign entities. 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.

In the instant case, the director determined that evidence initially submitted by the petitioner was insufficient to establish a qualifying relationship between the U.S. and foreign entity. As a result, the director submitted a request for evidence, requesting that the petitioner submit copies of all of the U.S. company's stock certificates issued to the present date. In response to the director's request for additional evidence, counsel submitted a letter, dated March 12, 2002, requesting additional time in which to prepare a response to the director's request. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." As of this appeal, counsel has failed to comply with the requests made by the director. 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 has failed to establish that a qualifying relationship exists between the U.S. and foreign entities. The record does not reflect that a subsidiary relationship exists between the U.S. and foreign entities as the record does not show that the foreign entity owns, directly or indirectly, more than half of the U.S. entity and controls the entity; nor does it show that the foreign entity owns, directly or indirectly, half of the U.S. entity and controls the entity; nor does the record reflect that the foreign entity owns, directly or indirectly, less than half of the U.S. entity, but in fact controls the U.S. entity. Neither does the record reflect that a qualifying affiliate relationship exists between the U.S.

entity and the foreign company as the record does not show that both entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. The petitioner has failed to submit copies of the corporate stock certificates, stock certificate ledger, stock certificate registry, corporate bylaws, minutes of relevant annual shareholder meetings, and purchase of shares agreements to demonstrate the entities qualifying relationship.

The record does not demonstrate that the foreign entity maintains ownership and control over the U.S. company. 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 the 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*.

On appeal, counsel asserts that a qualifying relationship does exist between the U.S. and foreign entities since the amount of capital needed for a company like the U.S. entity is approximately \$15,000. The petitioner also submits evidence on appeal that was not submitted in response to the director's request for evidence. 8 C.F.R. § 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts, See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. See *Matter of Bardouille*, 18 I&N Dec. 114 (BIA 1981). A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 175

(Comm. 1998). Counsel's assertions are not substantiated by documentary evidence. 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 (Reg. Comm. 1972). Hence, the petitioner has failed to submit evidence sufficient to establish a qualifying relationship between the U.S. and foreign entities.

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
- (iv) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The beneficiary's duties with the foreign entity are described in the petition as: construction supervisor, supervising and making final decisions in the foreign company, in charge of accounts and contacts. The beneficiary's proposed job duties for the U.S. entity are described in the petition as: directing, developing and managing all aspects of the business, including the finances, the signing of contracts, hiring of employees, and expanding the U.S. company business.

Although requested by the director, the petitioner failed to submit additional evidence to demonstrate the beneficiary would be employed by the U.S. entity in a managerial or executive position. 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 director, in denying the petition, determined that the petitioner had not submitted sufficient evidence to establish that the beneficiary has been or will be employed primarily in a managerial or executive capacity. The director went on to state that the evidence submitted with the petition is insufficient to demonstrate that the beneficiary has been functioning in a

managerial or executive capacity at the foreign entity. The director continues by stating that there is no indication that the beneficiary has been exercising significant authority over generalized policy or that the beneficiary's duties have been primarily managerial or executive in nature. The director concludes by stating that the evidence submitted concerning beneficiary's proposed duties in the United States was insufficient to demonstrate that the beneficiary will exercise significant authority over generalized policy or that his duties will be primarily managerial or executive in nature.

On appeal, counsel disagrees with the director's decision and asserts that the evidence submitted is sufficient to show that the beneficiary's job duties have been and will be primarily managerial or executive in nature.

On review of the record, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The information provided by the petitioner describes the beneficiary's duties with the foreign entity only in broad and general terms. Duties described as: supervised and made final decisions, and was in charge of accounts and contracts, are insufficient to demonstrate that the beneficiary is employed in a managerial or executive capacity abroad. The vague position description is insufficient to establish that the beneficiary's job duties for the foreign entity are managerial or executive in nature. Furthermore, there is no evidence to show how much of the time spent by the beneficiary while employed by the foreign entity is allotted to managerial or executive duties and how much to other non-managerial or non-executive functions. The petitioner has not provided persuasive evidence to establish that the beneficiary is managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. The petitioner has failed to produce an organizational chart depicting the foreign entity's corporate structure. The petitioner has submitted insufficient evidence to demonstrate that the beneficiary is employed by the foreign entity in a managerial or executive capacity.

The record does not demonstrate that the beneficiary's proposed job duties are managerial or executive in nature. Neither does the evidence establish that the U.S. entity contains the organizational complexity to support the proposed managerial or executive position. The record does not support a finding that the petitioner will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will

relieve the beneficiary from performing non-qualifying duties. Nor is the record, as presently constituted, persuasive in demonstrating that the beneficiary will be employed in an executive capacity at the U.S. entity. The record contains a general description of the beneficiary's proposed job duties that includes: directing, developing and managing all aspects of the business. This evidence is not sufficient to establish that the beneficiary will direct the management of a major component or function of the U.S. entity, establish goals and policies of the organization, exercise wide latitude in discretionary decision-making, or receive only general supervision from higher level executives. In conclusion, the record does not support a finding that the beneficiary has been or will be employed in a managerial or executive capacity.

In addition, the U.S. entity's 2001 U.S. Corporate Income Tax Return (IRS Form 1120) shows that gross receipts or sales totaled \$18,694. Thus, bringing into question the U.S. entity's ability to remunerate the beneficiary for his services. The tax return also reflects that no compensation of officers or salaries and wages were paid out in 2001. Thus, bringing into question the U.S. entity's ability to substantiate the need for a manager or executive. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) in that it is engaged in the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not represent the mere presence of an agent or office in the United States. A copy of the U.S. entity's 2001 corporate income tax return reveals a total of \$18,694 in gross receipts or sales. Again, as the appeal will be dismissed, this issue will 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; *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. U.S. Dept. of Justice*, 48 F.Supp.2d 22, 24 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.