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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 NW
Washington, DC 20536

OCT 02 2003

FILE: LIN 98 120 53112 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

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:

SELF-REPRESENTED

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, Vermont Service Center, denied the nonimmigrant visa petition on September 15, 1998. On October 16, 1998, the petitioner filed a motion to reopen. The Director denied the motion on February 10, 1999. On February 19, 1999, the petitioner filed a second motion to reopen. The Director denied the second motion on May 24, 1999. On appeal, the Administrative Appeals Office (AAO) affirmed the denial on May 9, 2002. Subsequently, the petitioner filed a motion with the AAO to reopen. The AAO will dismiss the motion to reopen. The AAO will affirm the dismissal of the appeal.

The petitioner, [REDACTED] states that it is an importer, wholesaler, and retailer of women's clothes and accessories. The petitioner claims that it is an affiliate of an Indian business, [REDACTED]. On March 23, 1998, the U.S. entity petitioned CIS to extend the beneficiary's classification as a nonimmigrant intracompany transferee (L-1A) for three years. In 1998, the petitioner sought to employ the beneficiary as the U.S. entity's Executive/Manager at an annual salary of \$30,000. The director determined, however, that the position's duties were neither managerial nor executive. Additionally, the director questioned whether a qualifying relationship existed between the U.S. and foreign entities.

The motion restates the beneficiary's claimed duties in the United States and asserts again that the petitioner is an affiliate of an Indian company. The petitioner attached evidence to the motion.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *Abudu*, 485 U.S. at 110. In addition, 8 C.F.R. § 103.5(a)(2) states in pertinent part, "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is evidence that was unavailable and could not have been discovered or presented in the previous proceeding.

The petitioner attached the following additional evidence to its motion to reopen:

- A newly completed Form I-129 that now identifies the beneficiary as the U.S. entity's president.
- The May 31, 2002 motion itself. The motion provides a general list of six duties that the beneficiary performs. These duties however, paraphrase the statutory definitions of a manager or an executive. See sections 101(a)(44)(A), (B) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1101(a)(44)(A), (B).
- A June 3, letter from a certified public accountant stating that the beneficiary is responsible for overall control of the U.S. entity. The CPA's letter, however, paraphrases the statutory definitions of a manager or an executive. See sections 101(a)(44)(A), (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A), (B).
- An organizational chart, which lists the beneficiary as supervising four unnamed employees: a manager, a salesperson, a cashier, and a display organizer. The chart identifies the beneficiary as president, chief executive officer, and chief financial officer. Additionally the chart depicts Raja D. Madan as vice president and secretary. Raja D. Madan does not supervise any employees.
- A list of employees who serve as salesgirls, cashiers, and display organizers. Although the list supplies employee names, it does not describe the duties, work schedules, or dates of employment.
- A 2001 U.S. Corporation Income Tax Return Form 1120. The tax return's Schedule K asserts that someone in India now owns 100 percent of the U.S. entity's stock. Schedule K does not identify the stock owner's name, however.

The petitioner could have submitted the CPA's statement, the organizational chart, and the list of salesgirls, cashiers, and display organizers during the previous proceeding. Moreover, the petitioner did not submit the CPA's statement in the form of an affidavit. Therefore, these documents cannot qualify as new evidence.

The new Form I-129, which reflects the beneficiary's new title, and the 2001 U.S. Corporation Income Tax Return were unavailable during the previous proceeding. However, CIS may not 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). Moreover, CIS will adjudicate the appeal based only on the record of proceedings before the director. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Thus, the AAO cannot now consider this evidence on appeal.

Additionally, the AAO notes that the 2001 U.S. Corporation Income Tax Return fails to resolve the conflicting evidence present in the prior proceeding. Specifically, the 2001 Form 1120 Schedule K does not identify who owns 100 percent of the U.S. entity's stock. Consequently, it is still unclear whether the U.S. entity has a qualifying relationship with the claimed Indian affiliate. 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 a nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant visa proceedings). Furthermore, 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). In sum, the petitioner presented no new persuasive, previously unavailable evidence; therefore, the AAO will dismiss the motion.

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*, 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, at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The motion is dismissed. The petition is denied.