

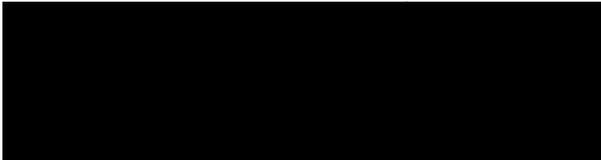
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U.S. Department of Homeland Security
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Washington, DC 20536

**U.S. Citizenship
and Immigration
Services**



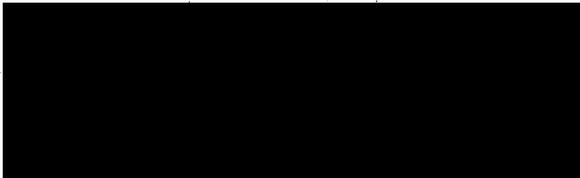
FILE: WAC 01 151 52656 Office: CALIFORNIA SERVICE CENTER Date: **APR 15 2004**

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, Impex Worldwide Enterprises, Inc., avers that it is a wholly-owned subsidiary of an Indian sole proprietorship, Holo Exports. The petitioner states it is an import and export business. The U.S. entity was incorporated in the State of California on November 1, 2000. The petitioner endeavors to hire the beneficiary as a new employee. Consequently, in March 2001, the U.S. entity filed a petition 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 president at an annual salary of \$45,000.

The director determined, however, that the beneficiary did not perform managerial or executive duties abroad and that the U.S. entity had failed to demonstrate a qualifying relationship with the overseas company. Consequently, on September 27, 2001, the director denied the petition.

On appeal, counsel asserts that the beneficiary's duties abroad were managerial and executive and that a qualifying relationship exists between the overseas and U.S. entities.

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.

Under 8 C.F.R. § 214.2(l)(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 (l)(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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The AAO notes that on Form I-129 the petitioner did not claim that the beneficiary was coming to the United States to open a new office; however, counsel's March 23, 2001 letter to CIS referenced this matter as a new office petition. In light of counsel's assertions, the AAO will treat this matter as a new office petition.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 of the new operation; and
- (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 paragraph (l)(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.

Initially, the AAO will determine 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 managerial or executive or involved specialized knowledge. See 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv).

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, the AAO looks 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.*

On the Form I-129, the petitioner described the beneficiary's duties for the past three years as: "[M]anaging and directing business; oversee[ing] and direct[ing] 10 employees in manufacturing and export operations[.]" An undated letter from the overseas entity attached to the Form I-129 stated: "[The beneficiary] is responsible for overall direction and control of the operations overseeing all financial aspects and strategic planning." A "Business Profile" attached to the Form I-129 indicated: "At present there are 4 persons, who are doing the work under the guidance of [the beneficiary], beside these person [*sic*] are technical [and] experts in their own field."

On May 10, 2001, the director requested that the petitioner:

Submit a more detailed description of the beneficiary's duties abroad. Be specific. Indicate exactly whom the beneficiary directs including their job title[s] and position description[s]. List all employees under the beneficiary's direction. Also, indicate [the] percentage of time the beneficiary spends in each of the listed duties.

(Emphasis in original.) In response, on July 31, 2001, the petitioner described the beneficiary's duties abroad as:

- Oversees company operations-50%;
- Oversees department, manages shipping, buying and export, responsible for budget, accounting and all financing-20%;
- Coordinates with US customers-20%; and
- Negotiates contracts and banking relationships-10%.

(Bullets added.) Additionally, the petitioner noted there are four employees abroad "plus contractors." The petitioner stated: "[The beneficiary] directs (1) Mr. Parmoad, a fashion designer responsible for quality assurance; (2) Mr. Susarlo Verma, who is responsible for purchase (shipping and export documentation)."

The organizational chart submitted in response to the request for evidence depicted four employees as reporting directly to the beneficiary:

- Parmoad Giri-Quality Incharge [sic]: Fashion Designer; Quality Assurance;
- Susanto [sic] Verma-Liasion [sic] Officer: Purchase; Shipment Clearance Including Export Documentation;
- Atma Ram: Despatch Incharge [sic]: Packing incharge [sic]; Follow up with Fabricator; and
- Ramneet Sethi-Additional Incharge [sic]: Finance/Accounts; Bank; Administration; Liasion [sic] with overseas Customers/Commercial; Jewellery [sic] Designer.

(Bullets added.)

The beneficiary's overseas job descriptions are vague and fail to convey an understanding of the beneficiary's daily duties. For example, the petitioner provided no concrete or quantitative examples to define: "oversees company operations," "manages shipping, buying and export," "coordinates with US customers," or "negotiates contracts [and] bank relationships." Similarly, the petitioner's attachments to the Form I-129 provided nonspecific descriptions of the beneficiary's duties. For instance, the petitioner did not define: "manage and direc[t] business"; "oversee and direct 10 employees in manufacturing and export operations"; and "is responsible for overall direction and control of the operations overseeing all financial aspects and strategic planning."

Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F. Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Additionally, approximately 50 percent of the beneficiary's duties abroad appear to comprise tasks necessary to produce a product or provide services. Specifically, the beneficiary manages shipping, buying and export tasks; is responsible for budgeting and accounting; coordinates with U.S. customers; as well as negotiates contracts and banking relationships. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Thus, the record lacks adequate supporting documentary evidence to demonstrate that the beneficiary's duties are primarily managerial or executive.

The AAO further notes that the petitioner has not demonstrated that the beneficiary primarily supervises a subordinate staff of professional, managerial, or supervisory personnel abroad who relieve him from performing nonqualifying duties. See section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In this instance, counsel asserted that the supervised personnel are "technical" experts. The assertions of counsel do not, however, constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). At least three of the employees' duties appear to overlap with the beneficiary's responsibilities. In particular, Susarlo Verma is responsible for export duties; Atma Ram is charged with packing goods; and Ramneet Sethi handles banking and administrative duties as well as coordination with overseas customers. In addition, the petitioner provided no evidence demonstrating that the claimed subordinate staff qualify as professionals as defined above. Thus, the record does not demonstrate that the claimed subordinates can relieve the beneficiary of his non-managerial duties.

Finally, the record presents conflicting evidence regarding the number of subordinates whom the beneficiary supervises abroad. Initially, the "Business Profile" supplied in connection with the Form I-129 stated that the beneficiary supervises four persons abroad. Likewise, in response to the request for evidence, the petitioner supplied an organizational chart which depicted the beneficiary as supervising four persons. The response to the request for evidence also alleged that the beneficiary supervised an unspecified number of contractors in addition to the four other employees. The record, however, contains no information about the claimed contractors.

Furthermore, an attachment to the Form I-129 stated that the beneficiary oversees and directs "10 employees in manufacturing and export operations." The petitioner did not identify the names or occupations of these 10 employees. 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). The record, therefore, fails to establish conclusively how many employees the beneficiary supervised at the time the petition was filed.

In sum, given the vaguely described job duties, the provision of tasks necessary to produce a product or provide services, the supervision of non-professional employees, and the submission of inconsistent evidence, the record cannot demonstrate that the beneficiary served as a manager or executive abroad.

The AAO now turns to the question of whether the petitioner has a qualifying relationship with the Indian entity. 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 (l)(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.

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*.

On the Form I-129 and on a cover sheet entitled, "Foreign Operations Documents," the petitioner claims that it is a subsidiary of an Indian company. Counsel's March 23, 2001 letter, an undated letter from Holo Exports, and an "Affiliate Relationship Diagram" state, however, that the U.S. entity is an affiliate of an Indian company. In short, the petitioner appears to use the terms "affiliate" and "subsidiary" interchangeably. The petitioner's stock certificate number one states that the Indian entity, not the Indian entity's sole proprietor, owns the 50,000 shares on the certificate. Consequently, the AAO will treat the connection between the Indian entity and the U.S. entity as a claimed parent to subsidiary relationship.

Initially, the petitioner submitted documents to support its contention that it is a subsidiary of an Indian company. The director determined, however, that these documents were insufficient to demonstrate a qualifying relationship. As a result, the director issued a request for additional evidence on this issue:

Submit evidence to show that the foreign parent company has, in fact, paid for the U.S. entity. The evidence should include copies of the **original wire transfers** from the parent company. Also, cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchase should be submitted. Provide the account holder names and affiliation to the foreign entity for all persons making purchases and the bank accounts that were used. The originator(s) of the monies deposited or wired must be clearly shown and verifiable by name with full address and phone/fax number. For all funds not originating with the foreign company, explain the source and reason for receiving such funds, and provide the names of all account holders depositing these funds, and their affiliation to the foreign or U.S. company.

(Emphasis in original.) In response, counsel submitted copies of:

[D]eposits made by customers in payment of account of [the Indian company] directly to [the petitioner]. The Parent Company in India shipped goods to a customer in the United States and then assigned the account received to the Petitioner . . . for collection. This amount was collected by Narinder Pal on behalf of [Indian entity] and then deposited in the account.

As previously noted, the assertions of counsel do not, however, constitute evidence. *Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez, supra*. Also, as previously explained, going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*.

In further response to the request for evidence, the petitioner submitted what appear to be deposit receipts for money orders; however, the cover letter and receipts fail to identify by name and location the "customers" who made the payments. Additionally, the cover letter not only fails to identify by name or location the "customer in the United States" but does not specify the value or type of goods shipped to the U.S. customer.

Furthermore, while the shipment register indicates that the Indian entity sold goods to the petitioner, the register does not explicitly establish whether these sales were used to purchase stock or the equivalent of stock in the petitioner. In light of the lack of supporting evidence, the record cannot establish a qualifying relationship between the Indian and U.S. entities.

Finally, beyond the decision of the director, the AAO will examine whether the beneficiary qualifies as a manager or executive under the new office requirements. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. The evidence fails to show that the United States operation will, within one year of the date of approval of the petition, support an executive or managerial position.

Specifically, on the Form I-129, the petitioner depicted the proposed U.S. duties as:

- Direct and develop import and export business for apparel;
- Oversee wholesale outlet for imports for sale to distributors;
- Coordinate imports with overseas affiliate;
- Review and make final approval of all hiring and firing decisions; and
- Perform strategic and financial planning for future growth.

(Bullets added.)

The undated letter from the Indian entity submitted in connection with the Form I-129 stated: “[The beneficiary] will be responsible for implementing [the Indian entity’s] strategic plan to expand our U.S. [s]ales through [the U.S. sales office] and will direct and oversee the business activities between the [Indian] office and the U.S. operations.” Additionally, in response to the director’s request for evidence, the petitioner depicted the proposed duties as “coordinate with Parent company; . . . promote sales and make new clients; . . . supervise and make all necessary arrangement[s] for imports [and] local buying for the sales outlet.”

The descriptions of the proposed job duties are vaguely worded; therefore, they do not convey an understanding of the beneficiary’s proposed daily duties during and after the U.S. operation’s first year of operation. As noted earlier, going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. In sum, it is impossible for CIS to determine whether the record supports counsel’s contention that the intended United States operation will support an executive or managerial position within one year of the date of approval 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.