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FILE: WAC 02 092 53366 Office: CALIFORNIA SERVICE CENTER Date: APR 26 2004

N RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

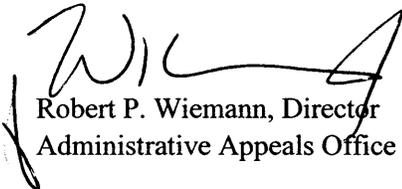
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 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 claims to be engaged in the business of importing and distributing garments. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president and general manager. The director determined that the petitioner had not established that it has a qualifying relationship with a foreign entity or that the beneficiary would be employed in a primarily managerial or executive capacity. On appeal, counsel disputes the director's findings and submits additional documentation.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The U.S. petitioner states that it was incorporated in the state of California in the year 2000 and claims to be a subsidiary of Samson Garments, located in India. The initial petition was approved and was valid from January 11, 2001 to January 11, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for two years at a salary of \$600 per week.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to determine that it has a qualifying relationship with a foreign entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

Branch means an operation division or office of the same organization housed in a different location.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

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 director thoroughly examined the issue of a qualifying relationship and accurately determined, based on the documentation submitted by the petitioner initially and later in response to CIS's request for evidence, that the petitioner failed to submit sufficient evidence to establish that it has a qualifying relationship with the foreign entity. The director specifically discussed the numerous copies of traveler's checks the petitioner submitted in an effort to establish that the checks were issued by the foreign company for the purpose of starting the petitioner's business operation. The director properly concluded that the copies of traveler's checks and their respective receipts do not establish the foreign entity's ownership of the petitioner's stock shares. The director also pointed out that neither Schedule K of the petitioner's year 2001 tax return nor page 2 of its state tax return indicated that the company is foreign owned.

On appeal, the petitioner submits documentation indicating that the traveler's checks purchased in India were later deposited into the petitioner's U.S. bank account. Counsel asserts in the accompanying brief that this transfer of funds establishes the foreign company's ownership of the petitioner's stock shares.

Counsel's assertion, however, is incorrect. The regulation 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

As properly pointed out by the director, the petitioner failed to submit any documentation indicating the number of shares it issued. Counsel's implication that the petitioner's failure to submit the requested evidence was the result of a mistake made by a third party is unsupported by any documentation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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).

As noted by the director, the AAO is unable to determine how much stock was issued. Although the petitioner has maintained the claim that the foreign entity contributed \$23,000 in exchange for its ownership interest in the U.S. company, Schedule L of the petitioner's 2001 tax return indicates that the petitioner issued \$1,500 worth of common stock. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, the petition does not acknowledge, much less clarify, this considerable inconsistency.

In addition to conflicting documentation regarding the amount of the foreign entity's monetary contribution, the petitioner submitted a stock certificate, issued in the year 2000, which does not indicate the value of the 100 shares issued to the foreign entity. Counsel explains this missing information by claiming that the law firm that helped incorporate the petitioning entity did not assign a par value for each share of its stock. However, even if that were the case, the petitioner's stock must at least have a stated value to account for the capital used to fund the company. *See Black's Law Dictionary* 980 (abridged 6th ed. 1991). The petitioner's failure to provide evidence of its stock's stated value, coupled with the conflicting evidence on record, make it impossible for the AAO to determine whether the foreign entity actually paid for its ownership of the petitioner's stock and thereby owns and controls the petitioning corporation. Therefore, the evidence of

record does not establish that the petitioner has a qualifying relationship with a foreign entity. For this reason the petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Immigration and Nationality Act ("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.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

[The beneficiary] has been associated with our company as Patner [sic]. He has been managing the overall functioning of the company and is well versed with all aspects of the business. He would be the Chief Executive Officer of our subsidiary company in [the] U.S.A.

In CIS's request for additional evidence, the petitioner was instructed to submit a more detailed list of the beneficiary's duties indicating the percentage of time spent performing each duty. The petitioner was also asked to provide its quarterly wage report for all of its employees for the last quarter of the year 2001, as well as an organizational chart listing the petitioner's employees, their job titles, and brief descriptions of their respective duties.

In the decision denying the petition, the director quoted the brief job description provided for the beneficiary and further noted the petitioner's failure to submit percentage breakdowns of the beneficiary's duties. The director concluded that the brief description of duties is broad and lacks sufficient detail in order to determine that the beneficiary's duties are primarily of a managerial or executive nature.

On appeal, counsel claims that "the unforeseen circumstances of the 9/11 incident" slowed down the petitioner's expansion and prevented the beneficiary from hiring additional personnel. However, any setbacks the petitioner may have undergone as a result of "unforeseen circumstances" do not relieve it of the burden of having to establish eligibility for the L-1A visa classification. Counsel further asserts that the director abused his discretion by placing undue emphasis on the size of the petitioner's staff. Contrary to counsel's assertion, the director's consideration of the size of the petitioning organization comports with current law. While size cannot be the sole consideration in determining eligibility for multinational manager or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant case, counsel stresses the beneficiary's broad decision-making authority over all policy and personnel matters within the petitioning organization. However, in light of the fact that the beneficiary was the petitioner's sole employee as of January 2002, the month the current petition was filed, such discretionary authority is reasonable and even necessary. The beneficiary was the only employee declared on the petitioner's 2001 fourth quarterly wage report. Although the petitioner declared three new employees in its wage report for the first quarter of 2002, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Therefore, the AAO must consider the petitioner's circumstances as they were at the time it filed the petition, not the changes that occurred after the filing date.

Furthermore, counsel states that CIS must take into account the reasonable needs of the petitioner in light of its stage of development. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, at the time of filing, the petitioner was a one-year-old import and distribution company that claimed to have a gross annual income of approximately \$200,000. The beneficiary was the firm's only employee. The petitioner did not submit evidence showing that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president and general manager. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily

managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) or the Act. The petitioner has not established this essential element of eligibility.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The AAO must look beyond the beneficiary's position title to determine the nature of the duties performed. In the instant case, the record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The record indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that he will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. The petitioner submitted a number of invoices and shipping documents suggesting that it has been selling its goods on a regular basis. However, the earliest invoice documenting the sale of the petitioner's goods dates back to April 2001. However, the petition was approved in January of that year. Thus, pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition. In the instant case, there is no evidence that the petitioner was doing business from January through March of 2001. For this additional reason the petition may not be approved.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.