

D

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: SRC 02 110 50919 Office: TEXAS SERVICE CENTER Date: AUG 16 2004

IN 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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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 filed this nonimmigrant petition seeking to employ the beneficiary as its vice president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas and claims to be doing business as a convenience store. The petitioner states that it is a subsidiary of Dhamani Enterprises, located in India. It seeks to employ the beneficiary in the United States for an initial period of one year.

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with a foreign entity and that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and indicates that the petitioner intends to submit a brief 30 days from the date of the filing of the appeal. However, more than one year since that date, no additional information has been submitted. Therefore, the AAO deems this record complete as currently constituted.

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 regulations at 8 C.F.R. § 214.2(l)(3) state 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 (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.

The first issue in this proceeding is whether the petitioner had a qualifying relationship with a foreign entity when it filed the petition.

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

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.

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.

In support of the petition, the petitioner provided its certificate of incorporation indicating that the petitioner was incorporated on September 18, 1996; a copy of its articles of incorporation indicating that the company will have the authority to issue 10,000 shares, 51 percent of which will be issued to Fati Bhimani and the remaining 49 percent to be issued to the foreign entity; and a stock certificate No. 5, dated December 10, 2001, showing the foreign entity as the owner of 5100 shares of the petitioner's stock. The petitioner also submitted its 1999 tax return. It is noted that Schedule K of the tax return does not indicate any foreign ownership, and Schedule L, No. 22, addressing liabilities and shareholders' equity shows only \$1,000 worth of stock as having been sold, even though the petitioner previously indicated that it issued all of its 10,000 authorized shares for no less than \$10,000.

On April 29, 2002, the director issued a request for additional evidence. The director pointed out that Part 5 of the petition indicates that the petitioner was established in 2001 even though various documents in the record indicate that the petitioner began doing business as Richmond Food Mart in October 1996. The director asked the petitioner to clarify whether the beneficiary would be employed in a new office.¹ The director also pointed to discrepancies regarding the foreign company's ownership, which varied from one document to another. The petitioner was instructed to provide documentation to confirm any stock transfers that may have occurred.

In response, the petitioner stated that it is not a new office and that anything on the petition indicating otherwise was an error. The petitioner also submitted a worksheet listing all the dates and names of parties to whom shares of the petitioning company were issued and corresponding dates of any cancellations of issued stock. The following is the chronological list of all the pertinent dates of issues and cancellations:

- September 17, 1996: 5100 shares issued to Fati Bhimani and 4900 shares issued to [REDACTED]
- October 24, 2001: cancellation of all shares issued on September 17, 1996 and reissue of 5000 shares to [REDACTED] and another 5000 shares to [REDACTED]
- December 10, 2001: Cancellation of all shares previously issued to [REDACTED] and reissue of 5100 shares to Dhamani Enterprises, Inc. and the remaining 4900 shares to [REDACTED]

The petitioner also submitted stock certificates Nos. 1-6 and a stock transfer ledger listing each of the above described transactions. The stock transfer ledger also listed the address for each party that either surrendered previously issued stock or the new party to whom the stock was issued. It is noted that the address of Dhamani Enterprises, Inc., the majority stockholder according to the most recent transaction, is Sugarland, Texas. This information contradicts the petitioner's original claim indicating that its parent company is located in India. Furthermore, the petitioner submitted its 2001 tax return in which it listed Nadir Waliyani and [REDACTED] each, as owners of 50 percent of the petitioner's stock, while Schedule K of the tax return maintained the prior claim that it is not owned by a foreign person or entity.

¹ 8 C.F.R. 214.2(l)(1)(ii)(F) defines *new office* as an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

On December 12, 2002, the director denied the petition. He discussed the changes in ownership of the petitioner's stock and concluded that the petitioner failed to submit evidence of any monetary transactions documenting the final sale of stock. The director also noted the inconsistency between Schedule K of the petitioner's 2001 tax return and the stock certificates and bill of sale previously submitted by the petitioner. The director cited another inconsistency by pointing out Exhibit 3 of the petitioner's response to the request for additional evidence (RFE) where the petitioner referred to itself as [REDACTED] *International Inc.* The director noted that the latter portion of the name had never before been used. Overall, the director concluded that the petitioner has submitted documents and information that are factually inconsistent with one another. As a side note, the director stated that if the petitioner is a franchise "it would be difficult to approve any person as an Intracompany transferee manager."

On appeal, counsel asserts that the details regarding the purchase, ownership and current operations are clear and insists that all pertinent information is on record. However, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the instant case, counsel does not specifically address, or even acknowledge, any of the significant inconsistencies discussed by the director. He merely repeats that all the necessary evidence of the petitioner's eligibility was previously submitted and is in the existing record of proceeding. However, the statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The only part of the denial that counsel specifically addresses is the director's mention of the possibility that the petitioner is a franchise and CIS's reluctance in approving an L-1A petition in cases where the petitioner is a franchise. Even though the director did not deny the petition based on the determination that the petitioner is a franchise, counsel objects to the director's comment stating that "[t]his is simply an erroneous statement of law" and asserts that whether or not a petitioning entity is a franchise has no bearing on a petitioner's eligibility to petition for an intracompany transferee. Black's Law Dictionary (7th Ed. 1999), defines a franchise as the sole right granted by the owner of a trademark or tradename to engage in business or to sell a good or service in a certain area.

A company that is part of a franchise operation must sell its products or services according to the rules prescribed by a franchise agreement. However, 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 immigrant 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)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). 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* at 595. If a petitioner is a franchise company, the question of authority to control the operation automatically arises, as it is possible that the franchise agreement to which a franchisee is subject may be so comprehensive as to infringe on the owner(s) power to control the entity.

In the instant case, the director did not actually determine that the petitioner is a franchise operation. The director merely noted that the petitioner created confusion by submitting conflicting information and that as a

result of this confusion it is possible that the petitioner may be a franchise operation. Nothing in the language used by the director suggests that any part of the denial was based on the director's assumption that the petitioner is a franchise. Therefore, counsel's objection is without merit. Aside from claiming that the petitioner is eligible based on the evidence of record, counsel provided no further argument to support the appeal. The petitioner failed to provide any evidence to reconcile the considerable inconsistencies that exist between the petitioner's tax documents and other submissions. The evidence of record is not sufficient to determine that the petitioner and the foreign entity share common ownership and control as in a qualifying relationship. For this initial reason, the petition cannot be approved.

The remaining 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 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] will manage the operations and sales activities of the company. He will direct staffing, training, and performance and evaluation to develop and control marketing programs. He will coordinate markets by establishing territories, quota and goals. He will analyze sales statistics to formulate policy and assist company personnel in promoting company products. He will represent the company at trade association meeting to promote company products. He will coordinate between sales department and other marketing-related units, analyze budgetary requirements, and prepare marketing reports. [The beneficiary] will direct product research and development, and recommend or approve budget expenditure and appropriations for research and development work. He will also direct researching of market conditions in local, regional, national markets to determine potential sales of products and services. In addition, [the beneficiary] will be responsible for negotiating property-structuring leases for the new stores with the landlords of the shopping centers and malls across the nation.

[The beneficiary] will possess the authority to hire and fire or recommend these as well as other personnel actions. He will have the authority to initiate projects, make decisions concerning the projects of the U.S. subsidiary and he will be responsible for carrying out the directives of the President to establish those projects. He will exercise wide latitude in discretionary decision-making, and report to and receive only general supervision from the Board of Directors in India.

In addition to requesting documents to support the existence of a qualifying relationship, the director also requested additional evidence to determine whether the beneficiary would be employed in a qualifying capacity. Namely, the petitioner was instructed to clarify the proposed duties of the beneficiary, as well as the duties of the company's other two employees.

The petitioner's response included brief descriptions for two of its current employees as well as the following list of the beneficiary's duties:

1. Manage operations and sales activities of the company, directs staffing, training and performance and evaluation to develop and control marketing programs.
2. Coordinate markets by establishing territories, [q]uota and goals.
3. Analyze sales statistics to formulate policy and assist company personnel and promoting company products.
4. Represent company at trade association meeting to promote company products. Coordinate between sales department and other marketing-related units.
5. Analyze budgetary requirements and prepare marketing reports.

6. Direct product research and development, recommend or approve budget expenditure and appropriations for research and development [sic] work.
7. Direct researching of market conditions in local, regional, national markets to determine potential sales of products and services.
8. Examine and analyze statistical data to forecast future marketing trends. Gather data on computers and analyze price, structures, sales and methods of marketing.
9. Direct the collection of data on customer preferences and buying habits.
10. Negotiating and property structuring leases for the new stores with the landlords of the shopping centers and malls across the nation.

On December 12, 2002, the director denied the petition noting that the petitioner has two employees who would not necessarily be managed by the beneficiary. The director concluded that the beneficiary would not be employed in a managerial or executive capacity. While counsel generally disputes the finding on appeal, he offers no additional statements or information to specifically address and overcome the director's conclusion.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner is a convenience store, which has been operating for longer than one year and, by the petitioner's own admission, cannot be considered a new office. The petitioner provides job descriptions for two employees, aside from the beneficiary's proposed position. As accurately summarized by the director, one of the employees actually opens and works in the store, while the other employee does the bookkeeping, paperwork, and oversees the subordinate who works in the store. Despite the petitioner's description of the beneficiary's proposed duties, a critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary would be employed in a qualifying managerial or executive capacity. The petitioner discussed sales statistics, territories, coordinating markets, and listed a number of marketing-related duties. However, there is no indication how any of these duties would realistically be required in the context of a convenience store. Furthermore, there is no indication, based on the job descriptions of the petitioner's other two employees, as to who would actually be performing any of the marketing duties the beneficiary would purportedly be directing. 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).

The petitioner has not demonstrated that the beneficiary would primarily supervise a subordinate staff of professional, managerial, or supervisory personnel, or that he would otherwise be relieved from performing non-qualifying duties. Although the petitioner has apparently been in business for a number of years, there is no evidence that it has reached a level of organizational complexity wherein the hiring/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.

SRC 02 110 50919

Page 9

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.