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Washington, DC 20536

U.S. Citizenship and Immigration Services

FEB 20 2004

FILE: WAC 00 110 52036 Office: CALIFORNIA 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:

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 appeal will be dismissed.

The petitioner is described as an importer and wholesaler of terry cloth products and textile garments. It seeks authorization to employ the beneficiary temporarily in the United States as its president. The initial petition for L-1A status was filed on March 2, 2000. The director issued a request for evidence on April 4, 2000. The petitioner stated it responded to the request on June 28, 2000. On September 19, 2000, the director issued a Notice of Decision – Denial due to abandonment. On June 7, 2001, the petitioner contacted CIS claiming the denial was issued in error. The director agreed to reopen the case. On August 30, 2001 the director issued a Service Motion to Reopen/Reconsider Intent to Deny. The petitioner was afforded 30 days to submit evidence and/or a written statement in rebuttal to the notice. On September 25, 2001, counsel for the petitioner submitted a written statement and evidence in response to the intent to deny. On March 18, 2002, the director denied the petition determining that the petitioner had not established that a qualifying relationship exists between the U.S. company and the foreign company.

On appeal, the petitioner submits additional evidence and counsel asserts that the petitioner has demonstrated that it is the subsidiary of the foreign company and that they have a qualifying relationship.

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(l)(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 (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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) states that 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 over 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 paragraphs (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.

At issue in this proceeding is whether a qualifying relationship exists between the petitioning company and the claimed parent company.

Bureau regulations at 8 C.F.R. § 214.2(l)(ii)(G) define the term "qualifying organization" as follows:

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.

8 C.F.R. § 214.2(l)(ii)(I) states:

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

8 C.F.R. § 214.2(l)(ii)(J) states:

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

8 C.F.R. § 214.2(l)(ii)(K) states:

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.

8 C.F.R. §214.2(l)(ii)(L) states, 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 petitioner s located in Irvine, CA, and stated on the Form I-129 that it was established in 1999. The petitioner indicated that it had one employee and that the alien was not coming to the U.S. to open a new office. The petitioner claimed to be the subsidiary of located in Karachi, Pakistan. In support of this claim, counsel for the petitioner submitted a letter which stated has a 51% stock ownership in the U.S. corporation (subsidiary) and 51% ownership in the Pakistan corporation (parent company) has a 49% stock ownership in the U.S. corporation (subsidiary) and 49% ownership in the Pakistan corporation (parent company)." In support of this statement the petitioner submitted a Shareholders Agreement which is dated February 2000 and signed by the above parties. This agreement states "[b]eneficiary, owns 49% and 49% of (Private) Limited. It is further stated that owns 51% of USA, Inc. and 51% of Kamdar Fashions (Private) Limited."

Additionally, the petitioner submitted a Memorandum and Articles of Association of the foreign company that included a list dated October 9, 1995, of its three shareholders and the amount of shares that each owned. The list of three shareholders consists of:

10 shares
10 shares
10 shares

On April 4, 2000 the director issued an extensive request for additional evidence. The director requested the following, in pertinent part:

Documents pertaining to the foreign company:

- Annual report
- Minutes of the meeting – stock ownership: Submit a copy of the minutes of the meeting for the foreign company that lists the stock shareholders and percentage of share owned.
- List of owners: Provided a detailed list of all owners of the foreign company and what percentages they own. List names, corporate and specific government affiliation, and percentages of ownership.

- Articles of incorporation: Submit a copy of the foreign company's articles of incorporation.

Documents pertaining to the U.S. business:

- Proof of stock purchase: Submit evidence to show that the foreign parent company has, in fact, paid for the U.S. entity. The evidence should include copies of original wire transfers from the parent company. Also cancelled checks, deposit receipts, etc., detailing monetary amounts for the stock purchases 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 that names of all account holders depositing these funds, and their affiliation to the foreign or U.S. company.

- Annual report

- Minutes of the Meeting-Stock Ownership: Submit a copy of the minutes of the meeting for the U.S. company that lists the stock shareholders and the number and percentage of shares owned.

- Stock Certificates: Submit copies of all of the U.S. company's stock certificates issued to the present date clearly indicating the name of each shareholder.

- Stock Ledger

- Detailed list of owners: Submit a detailed list of all owners of the U.S. company and what percentages they own. List names, corporate and specific government affiliation, and percentages of ownership.

- Notice of transaction pursuant to corporations: Submit a copy of the U.S. company's Notice of Transaction Pursuant to Corporate Code Section 2510(f) showing total offering amounts. If not already provided, please show that the parent company has, in fact, paid for the stock ownership. The evidence should include wire transfers, bank statements, cancelled checks, etc., and must clearly document that the parent company has paid for the stock ownership.

On June 28, 2000, the petitioner responded to the director's request for evidence. On September 12, 2000, the director issued a Notice of Decision denying the petition due to abandonment. On, approximately, June 07, 2001, the petitioner contacted CIS claiming the decision was in error. The director determined that reopening the case was warranted and requested a reconstructed file. After reviewing the requested evidence, on August

30, 2001, the director issued a service motion to reopen/reconsider intent to deny.

Because the petitioner needed to reconstruct the file for the director and additional evidence was submitted in response to the Motion to Reopen/Reconsider Intent to Deny, the AAO will treat all documents submitted to the director as a single response to the Motion to Reopen/Reconsider Intent to Deny.

In his response, counsel explained that his office inadvertently stated that the L-1A visa was not being filed for a new office. To correct this error, counsel stated the beneficiary is coming to the United States to open a new office.

In its responses, the petitioner re-submitted the foreign company's Memorandum and Articles of Association. These documents do not refer to any affiliates or subsidiaries. The Articles of Association states the number of outstanding shares and the shareholders names as:
Kamdar owns 10 shares; Jamil owns 10 shares; and wns 10 shares.

Regarding the ownership of the U.S. company, the petitioner submitted a different shareholders agreement that was dated May 9, 2000 and prepared on the petitioner's letterhead stating:

> This Shareholder's Agreement is between the Beneficiary, and Petitioner, . It is stated that the parent company, (Private) Limited owns 51% of the U.S. Subsidiary, K&H USA, Inc. namely owning 25% and owning 24%.

This second agreement was signed by . The petitioner also submitted another document signed on May 9, 2000. It is a letter on the petitioner's letterhead from Nayyer Jamil stating that the beneficiary is authorized to withdraw $21,0000 from Bank of America "for the payment of 21,000 shares of K&H USA, Inc. stock at $1.00 per share." The letter further states, "Therefore, (Private) Limited owns 51% of K&H USA, Inc."

Additionally, the petitioner submitted three stock certificates for the petitioner. These stock certificates were dated November 1, 1999 and state the following:

Shareholder	Amount of Shares
	10,000
	9,000
	21,000

The petitioner submitted copies of three wire transfers deposited into the personal account of the beneficiary. These fund transfers were dated November 3, 1999, December 7, 1999, and February 14, 2000. The petitioner also submitted several bank statements for the personal bank account of the beneficiary. Also, the petitioner submitted one bank statement for an account in the name of the petitioner for the period of April 3, 2000 to April 11, 2000 with an account balance of $5,000. Finally, the petitioner submitted an online statement for the petitioner's business account dated June 26, 2000, showing several deposits for the month of June and an ending balance of $60,054.

On August 30, 2001, the director issued a motion to reopen/reconsider intent to deny. The director found that there were so many inconsistencies in the record that CIS was not convinced that the petitioner has established that a qualifying relationship exists between the foreign entity and the petitioner. The director found the evidence indicated that even though the petitioner issued 21,000 shares of stock in November 1999, it did not establish that the $21,000 in capital was ever deposited into the petitioner's bank account. Furthermore, the stock purchase was not even authorized until six months later in May 2000. Additionally, the copies of the wire transfers indicate that monies were deposited into the beneficiary's personal bank account and do not indicate that they came from the foreign parent company.

In the director's notice of intent to deny, she stated that the evidence fails to establish that the petitioner is a subsidiary or an affiliate of the beneficiary's foreign employer, the beneficiary is ineligible for classification as an intracompany transferee.

In response, counsel asserted that the monies transferred into the beneficiary's bank account were later transferred into the petitioner corporate bank account. Counsel explains "the Petitioner could not have transferred funds into his [sic] account until the incorporation was completed and everything was established." Counsel further justifies the petitioner's actions "[s]ince the authority was given in May, 2000 and the incorporation was done in October, 1999, thus the transfer serves as a viable business transaction for all tax and capital investment reasons."

As an explanation to the director's concerns that the issuance of the stock occurred in November of 1999 and that the authorization letter for the payment of the stock was dated May 2000, counsel states " . . . this was only a commitment by the Petitioner to invest in the U.S. company. The corporation must be capitalized first before any stocks can be issued."

In response to the director's concerns that there is no evidence to show the parent company invested in the petitioner, counsel explains, "[t]he wired funds belong to the parent company and/or parent company and arrangements by and through a third party agent to transfer the funds." Counsel supports the petitioner's actions by stating, "there is no written authority which states that the funds have to be transferred directly from the parent company. This is a normal practice for many companies to use a third party to transfer the funds to avoid government bureaucracies."

After reviewing the petitioner's response, the director concluded the evidence fails to establish that the petitioner is a subsidiary or a beneficiary's foreign employer. The director stated:

> It is not clear to [CIS] how the petitioner can expect [CIS] to believe the evidence presented in its petition when the petitioner has advised [CIS] that the convoluted financial transactions it claims it performed was for specific purpose of evading it's own country's laws. This is the very reason [CIS] requests copies of wire transfers that show the foreign entity as the originator and the petitioner as the beneficiary because it, unmistakably, establishes who has invested in the petitioning entity.

Additionally, the petitioner submitted its corporate tax return beginning October 1999 and ending September 30, 2000. The director noted that Schedule K of this tax return does not indicate foreign ownership. Furthermore, Statement 3 of the tax return clearly shows the beneficiary as the owner of 100 percent of the petitioner's stock. The petitioner also submitted evidence that the beneficiary owns 33 ½ percent of the

foreign entity. The director concluded that there is no qualifying relationship because the beneficiary does not own and control both entities.

On appeal, counsel provides the same explanations that were provided to the director's notice of intent to deny. Counsel states that sufficient evidence was provided to demonstrate that a qualifying relationship exists between the petitioner and the foreign company.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) specifically allows the director to request such evidence as the director may deem necessary. While the petitioner has submitted stock certificates, shareholders agreement, and Articles of Incorporation for the U.S company and a Memorandum and Articles of Incorporation for the foreign company, the petitioner has not established that the foreign company owns and controls the U.S. company or that they share common ownership so that they may qualify as affiliates. Counsel again explains "[t]he wired funds belong to the parent company and/or parent company and arrangements by and through a third party agent to transfer the funds." Counsel claims that the petitioner does not need to establish who or which entity has actually invested in the petitioner. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, on appeal, counsel does not explain the discrepancy in the previously submitted tax return but simply submits two Form 1120X Amended U.S. Corporation Income Tax Returns for the tax years ending September 2000 and 2001. The AAO notes that the petitioner did not submit any evidence that these amended tax returns were filed with the Internal Revenue Service. Additionally, the AAO notes that the amended form for tax year ending 2001 indicates in schedule E that the beneficiary is an officer and owns zero percent of corporation stock, yet the petitioner stated and submitted a stock certificate to the effect that the beneficiary owns 25 percent of the petitioner. Another inconsistency noted by the AAO is that Statement 3 of Schedule K, of both amended forms, indicates that the foreign entity owns 100 percent of the petitioner which contradicts statements by the petitioner and the previously submitted stock certificate which states that the foreign entity owns 51 percent of the petitioner.

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). Simply submitting an amended tax form does not qualify as independent and objective evidence. 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). Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

The concern raised by the director that the alleged stock purchase by the foreign entity was not authorized until six months after the stock certificate was issued has not been sufficiently addressed. On appeal, counsel restates the explanation that was previously presented. Counsel states:

> [T]he stocks could only be issued once the incorporation is completed and the stock certificates have been printed. Since the incorporation was done in October of 1999, the

> issuance of the stock in November of 1999 is legitimate. Even though the authorization to transfer the funds and the issuance of the stock letter is dated May, 2000, this was only a written commitment by the Petitioner to invest in the U.S. Company.

As stated above, this letter regarding the $21,000 payment for the 21,000 shares of the petitioner's stock was written on the petitioner's letterhead and authorizes the beneficiary to withdraw funds for the payment. This letter further states that the foreign entity owns 51 percent of the petitioner. These statements by counsel do not sufficiently explain how it is possible to issue a stock certificate for 21,000 shares and then have the petitioner authorize payment for such shares six months later, nor do they demonstrate that the foreign entity owns 51 percent of the petitioner. This inconsistency casts further doubt on the reliability and sufficiency of the petitioner's evidence. *Matter of Ho, supra.*

Another inconsistency presented by the record is found in the two shareholder agreements. The first Shareholders Agreement is dated February 2000 and states "Beneficiary owns 49% of K & H USA, Inc. and 49% of (Private) Limited. It is further stated that owns 51% of K & H USA, Inc. and 51% of (Private) Limited." The record shows that the instant petition was filed in March 2000. The petitioner then submits a second agreement in response to the director's request for evidence which was dated May 9, 2000 and signed by

This agreement states that the foreign company owned 51 percent of the U.S company. Based on the evidence provided, the ownership of the petitioner changed after the filing of the initial petition. If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of the qualifying relationship will be based on the evidence of ownership submitted with the initial petition.

The AAO notes that counsel cites a nonprecedent decision in support of its ability to establish a qualifying relation after the filing of the initial petition. However, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. 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).

Counsel's arguments are not persuasive. 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 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 (BIA 1988)(in immigrant visa proceedings). 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, supra* at 595.

The record clearly indicates that the petitioning enterprise does not maintain a qualifying "subsidiary" or "affiliate" relationship with the overseas company. Notwithstanding the petitioner's confused and contradictory claims, the evidence indicates that the foreign company is owned by three individuals, each with equal ownership

interests. The initial evidence provided by the petitioner establishes that petitioning entity in the United States is owned by two individuals. Accordingly, the petitioner is not a subsidiary as defined by 8 C.F.R. § 214.2(l)(ii)(K). The evidence provided did not establish that the foreign company 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. Additionally the petitioner and foreign company do not qualify as affiliate because they are not "owned and controlled by the *same group* of individuals, each individual owning controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. § 214.2 (l) (1) (ii) (L) (*2*) (emphasis added).

In reviewing the inconsistent evidence and the lack of documentation there is insufficient evidence in the record to support the petitioner's claim that the foreign entity owns and controls the U.S. entity. Consequently, it must be concluded that the petitioner has failed to demonstrate a qualifying relationship with a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). For this 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.