

U.S. Department of Homeland Security  
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
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JAN 07 2004

FILE: WAC 02 054 52240 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).

IN BEHALF OF PETITIONER:



**PUBLIC COPY**

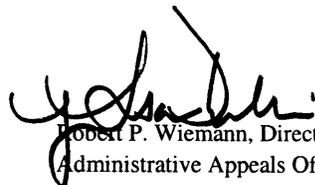
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, O.S. Enterprises, Inc., claims to be a subsidiary of Hemkunt Exim Private Limited located in India. The petitioner is engaged in the real estate/motel investment business and seeks to employ the beneficiary temporarily in the United States as its managing director for a period of three years.<sup>1</sup> The petitioner states that the beneficiary will have the responsibility of opening and managing the office in the United States to oversee and conduct commerce and investments throughout the United States. The petitioner was incorporated in the State of California on June 7, 2001 and claims six proposed employees.

Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant manager or executive pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). On June 18, 2002, the director denied the petition and determined that the petitioner had not established that the beneficiary has been or will be employed in a managerial or executive capacity. The director also found that the petitioner failed to provide evidence that it has or is doing business and that a qualifying relationship exists between the petitioner and foreign entity.

On appeal, the petitioner's counsel submits a brief with additional evidence. The petitioner asserts that the beneficiary serves as an executive at the foreign company and that there is a qualifying relationship between the petitioner and the foreign entity.

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

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<sup>1</sup> The petitioner seeks to employ the beneficiary, as indicated on Form I-129, at a salary of "100,000 Rupees P/M." The petitioner is required to provide wages per week or per year in U.S. dollars. However, although an important factor, it is not determinative on the outcome of this decision.

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(1)(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 (1)(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 with 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.

Pursuant to 8 C.F.R. § 214.2(3), section 101(a)(15)(L) a visa petition may be approved by filing Form I-129, accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (1)(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's prior year of employment abroad 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.

(iv) 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;

(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 (1)(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.

The first issue in this proceeding is whether the beneficiary has been and will be primarily performing managerial or executive duties. 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 will look 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 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.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of either capacity.

On November 20, 2001, the petitioner filed a petition for L-1A classification on Form I-129. In a letter included with the petition, dated November 19, 2001, the petitioner described the beneficiary's proposed United States duties as:

[H]e has been assigned the responsibility of opening and managing an office in the United States to oversee and conduct commercial investments throughout the U.S. Mr. Singh's skills are urgently needed by O.S. Enterprises Inc. in the United States to[:]

(a) direct the management of Strategic Marketing, and client relations, maintain and expand the company's relationships with existing and future clients;

(b) realign the focus of O.S. Enterprises Inc. in the United States to stay in tune with the ever changing marketplace

(c) draw upon his intimate knowledge of the resources at the disposal of O.S. Enterprises and Hemkunt Exim Private Limited in India.

On June 18, 2002, in the notice of decision, the director determined that the record was insufficient to demonstrate that the beneficiary will be functioning in a managerial or executive capacity because "the petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than a position title." The director found that the organizational chart submitted for the U.S. entity did not identify the beneficiary's position, contain a comprehensive description of the beneficiary's duties, and did not list descriptions of job duties, educational levels, or salaries for all employees under the beneficiary's supervision.

On appeal, counsel's July 17, 2002 brief asserts that the beneficiary is acting in an executive capacity. Counsel resubmits the letter, dated November 19, 2001, and reiterates that:

[T]he beneficiary has intimate knowledge of both the marketing and physical resources available to Hemkunt Exim Private Limited in India and O.S. Enterprises Inc. and is uniquely placed to formulate and implement policies and to market their services to clients in the States as well as provide the necessary direction to the board of directors located in India. . . . Being a senior executive of the company, he will have great latitude in the execution of corporate strategy and establishing goals and policies pertaining to marketing and client relations as well as responsibility for making all decisions in this area. Mr. Singh is clearly functioning in an executive capacity.

Upon review, the beneficiary's proposed duties in the United States are described, in a letter submitted with Form I-129, utilizing phrases as "oversee and conduct," "realign the focus," and "draw upon his intimate knowledge." These phrases are vague and general. The petitioner fails to identify how the beneficiary will oversee and realign the United States entity or specifically draw upon the beneficiary's knowledge. In addition, the petitioner describes the beneficiary as "being a senior executive of the company, he will have great latitude in the execution of corporate strategy and establishing goals and policies pertaining to marketing and client relations . . . ." and "[f]ormulate and [a]dminister new business policies and procedures." These duties are generalities that fail to list any concrete "policies" that the beneficiary will plan, develop, or establish. The petitioner did not enumerate any of these policies. Although the petitioner avers that the beneficiary is a "senior executive" as the "managing director," the AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

Further, it appears that a significant portion of the beneficiary's duties will be directly providing the services of the foreign and United States entities. The record indicates that the preponderance of the beneficiary's duties will be directly performing the non-managerial day-to-day operations in an effort to procure business in the real estate market. However, it must be evident from the documentation submitted that the majority of the beneficiary's actual daily

activities are managerial or executive in nature. The petitioner submitted no information to establish the percentage of time the beneficiary actually performs the claimed managerial or executive duties. Since the beneficiary is responsible for daily activities then it appears, at most, the beneficiary performs operational rather than managerial or executive duties. In addition, the description of the beneficiary's duties does not persuasively demonstrate that the beneficiary has managerial control and authority over a function, department, subdivision, or component of the company.

Moreover, to qualify as a manager, the beneficiary must supervise a subordinate staff of professional personnel who can relieve him from performing nonqualifying duties. The director determined that the petitioner had not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in "a position title."

The AAO will adjudicate this issue based on the evidence available to the director at the time of his review. It is an established rule that the AAO does not consider new evidence on appeal where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by CIS. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the present case, the petitioner was notified by the director in his request for evidence that additional documentation was necessary to determine whether the beneficiary had been and will be employed in the requisite capacity. The petitioner failed to provide the more detailed evidence, which it subsequently submitted on appeal. As this evidence was previously available to the petitioner and directly requested by the director, it will not be considered on appeal. *Id.* After careful consideration of the evidence, the AAO must conclude that the beneficiary has not been employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the beneficiary has been primarily performing managerial or executive duties for the foreign entity abroad. As previously stated, 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 within three years preceding the beneficiary's application for admission into the United States, must have employed the beneficiary in a qualifying managerial or executive capacity, or in a

specialized knowledge capacity, for one continuous year. See *id.*

In a letter included with the petition, dated November 19, 2001, the petitioner described the beneficiary's duties for the foreign entity as

[I]n July of 1994, Mr. [REDACTED] worked in the marketing field for Hemkunt Exim Private Limited in India. He has independently directed the growth of HEM in India and is familiar with U.S. operations due to his frequent visits here. When he joined Hemkut, then a partnership, in India, he handled all commercial and residential investments throughout the country. In 1999, he expanded the business to investments in the hotel industry in India. Mr. [REDACTED] was responsible for locating new territories for real estate investments throughout India. In June 2001, Hemkut was incorporated. Mr. [REDACTED] was appointed to the board of directors of Hemkunt Exim Private Limited in India. In July 2001, Mr. [REDACTED] was further appointed as Managing Director.

On May 23, 2002, the director requested that the petitioner submit additional evidence to "establish that the beneficiary has been performing the duties of a manager or executive with the foreign company[.]" In particular, the director requested that the petitioner submit the following information:

- the total number of employees at the foreign entity where the beneficiary is employed;
- the foreign entity's organizational chart describing its managerial hierarchy and staffing levels including a brief description of job duties;
- educational levels and annual salaries for all employees under the beneficiary's supervision; a percentage of time the beneficiary spends in each of the listed duties;
- the foreign company's payroll records pertaining to the beneficiary for the year preceding the filing of the first petition for L-1 status; and
- the date the beneficiary was hired, positions held, and why the beneficiary was selected for the position with the U.S. entity.

In response to the director's request, the petitioner submitted an organizational chart of the foreign entity and a salary sheet for the directors and staff. The organizational chart listed the position and number of employees under each position. There were no names, duties, or educational levels provided.

In the notice of decision, dated June 18, 2002, the director determined that the record was insufficient to demonstrate that the beneficiary has been functioning in a managerial or executive capacity because "the petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than a position title." The director found that the organizational chart submitted for the foreign entity did not identify the beneficiary's position, contain a comprehensive description of the beneficiary's duties, and did not list descriptions of job duties, educational levels, or salaries for all employees under the beneficiary's supervision.

On appeal, counsel asserts, "[t]he foreign company's organizational chart clearly demonstrates that the beneficiary functions as an executive within the organization." The petitioner submits the foreign entity's employees' salary sheet and organizational chart including the employees' titles listing their names and a brief description for each employee under the beneficiary's supervision. The petitioner further provides additional information about the beneficiary's duties abroad that states:

Business Development, National and International travel for business expansion. Formulate and Administer new business policies and procedures with senior level management. Review all company records. Meeting with the financial advisors, legal corporate council and members of the board for the final decision making process.

As previously stated, the AAO will adjudicate this issue based on the evidence available to the director at the time of his review. It is an established rule that the AAO does not consider new evidence on appeal where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by CIS. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). As the evidence submitted on appeal was previously available to the petitioner and directly requested by the director, it will not be considered on appeal. *Id.*

On review, the beneficiary appears to be primarily involved in the daily operations abroad as indicated in the record that the beneficiary is "uniquely placed to formulate and implement policies to market their services . . . ." These duties primarily appear to comprise marketing tasks. Marketing duties qualify as performing a task necessary to provide a service or product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). As the appeal will be dismissed on the grounds previously discussed, this issue need not be examined further.

More importantly, even if the AAO had found the beneficiary's foreign employment to be in an executive capacity, the record is not persuasive that the beneficiary has met the "one continuous year" requirement for L-1 classification. As set forth earlier, 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 establish that within three years preceding the beneficiary's application for admission into the United States, the beneficiary must have been employed in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for *one continuous year*. *Id.* Although the petitioner claims that the beneficiary has been employed in an executive or managerial capacity for one continuous year, the record does not support the petitioner's assertion. The record contains two inconsistent documents. The first document was a letter submitted by the petitioner's counsel, dated November 19, 2001, stating:

[I]n July of 1994, Mr. [REDACTED] worked in the marketing field for Hemkunt Exim Private Limited in India . . . he handled all commercial and residential investments throughout the country. In 1999 he expanded the business to INVESTMENTS IN THE HOTEL INDUSTRY IN India. Mr. Singh was responsible for locating new territories for real estate investments throughout India. . . . [i]n July 2001, the beneficiary was further appointed as Managing Director."

The second document is a letter addressing "to whom it may concern" from the foreign entity's director, Kanwar Divindra Singh, reporting that

This is to certify that [the beneficiary] has been the Managing Director of Hemkunt Exim Pvt. Ltd. since January 25, 2001. Prior to this, this business was

operating as a partnership since March 1994 until incorporation.

(Emphasis added.) At the time of the beneficiary's appointment, the beneficiary had a B1 visa (temporary visitor for business) issued on March 1, 2001 that expired on December 1, 2001. During that time, the petitioner filed Form I-129 for L-1A classification on November 20, 2001. However, at the time of filing, the beneficiary had not been appointed as managing director of the foreign entity until July 2001 (less than six months in a managerial or executive capacity) or possibly January 25, 2001 (less than twelve months in a managerial or executive capacity). Therefore, by the petitioner's own admission, it appears that the beneficiary was not employed for "one continuous year" with the foreign entity in a managerial or executive capacity. Therefore, the beneficiary would not meet the "qualifying managerial or executive capacity for one continuous year" requirement for L-1 classification. See *id.* It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and 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, 591-92 (BIA 1988).

The third issue in this proceeding is whether the petitioner has a qualifying relationship with the foreign entity. A qualifying organization must meet certain criteria. The regulations at 8 C.F.R. § 214.2(1)(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 (1)(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.

In pertinent part, the regulations at 8 C.F.R. § 214.2 (1)(1)(ii)(I-L) define "parent," "branch," "subsidiary," and "affiliate" as:

(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 regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and the foreign entity. See *Matter of Church of 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). In the context of this visa proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control. *Matter of Church of Scientology International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Id.*

Although the petitioner submitted evidence with the initial petition, the director requested additional evidence to establish whether the petitioner and foreign entity have a qualifying relationship. In particular, the director requested the foreign entity's annual report, minutes of the meeting that lists the stock shareholders and the number and percentages owned, a list of all owners of the foreign company and what percentages they own, and the articles of incorporation.

In response to the director's request concerning the qualifying relationship, the petitioner submitted minutes of the meeting. The minutes indicated the allotment of shares of the foreign entity. The beneficiary was issued 62,300 and Kanwar Divindra Singh was issued 34,256 shares.

In the director's notice of decision, he determined that the stock certificate submitted was not sufficient evidence to demonstrate ownership and control of the U.S. entity. The director found that the record contained no information, such as copies of wire transfers from the foreign entity, showing that the \$5,000 was transferred in exchange for the 50,000 shares. The director also determined that the record does not establish that the U.S. company is owned and controlled by the same parent or individual or that the two companies are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or portion of each entity or that an individual, or identical group of individuals has effective de jure or de facto control of both organizations pursuant to 8 C.F.R. 214.2(1)(K)&(L).

On appeal, counsel for the petitioner asserts "the stock certificates show that the parent company owns the U.S. company." Counsel provides copies of the original wire transfers from the parent company and asserts that the wire transfers "prove that parent company paid for [the] U.S. Company's stock." Counsel also asserts that the documentation from the parent company and minutes of the first meeting of the U.S. company "clearly indicates that the same group of individuals own and control both companies."

As previously stated, the AAO will adjudicate this issue based on the evidence available to the director at the time of his review. In response to the director's request for evidence of the funds transferred by the foreign entity, the petitioner, on appeal, submitted evidence of two wire transfers in the amount of \$5000. However, the petitioner submitted two identical copies of wire transfers that indicate that \$5000 was wired, in October 2001, to W.S.F.S. Bank, account numbers

20770827, by [REDACTED] to the beneficiary. Since the wire transfers are identical, there appears to be only one wire transfer. There is also a gap in time between the wire transfers of October 2001 and the "to whom it may concern" April 18, 2002 letter verifying that checking account #207770827 has a balance of \$10,000. In addition, the petitioner submitted a copy of the stock ledger certificate indicating the number of original shares as 50,000. However, this document appears to have been altered as there are handwritten and type-faced numbers printed on the document. Although the petitioner submitted evidence on appeal that was previously requested by the director, it is an established rule that the AAO does not consider new evidence on appeal where the petitioner was put on notice of evidentiary requirements and given a reasonable opportunity to provide it for the record before the petition was adjudicated by CIS. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). As the evidence submitted on appeal was previously available to the petitioner and directly requested by the director, it will not be considered on appeal. *Id.*

Upon review, the AAO finds that there are numerous inconsistencies in the record that include the following:

- In a letter, dated November 19, 2001, the petitioner states that in June 2001, the foreign entity was incorporated, and the beneficiary was appointed to the board of directors of the foreign entity in India.
- The certificate of incorporation indicates that the foreign entity was incorporated January 20, 1999.
- The articles of incorporation indicate that the U.S. entity was incorporated in the State of California on June 7, 2001.
- The petitioner's Tax Form 1120 indicate that the U.S. entity was incorporated on December 27, 2001.
- On November 20, 2001, the petitioner indicated on the supplement to Form I-129, that the petitioner is a subsidiary of the foreign entity and that "THE U.S. COMPANY, O.S. ENTERPRISES INC. IS WHOLLY OWED BY THE INDIAN COMPANY, HEMKUNT EXIM PRIVATE LIMITED IN INDIA."
- In a letter, dated November 19, 2001, the petitioner stated, "[t]he U.S. company, O.S.

Enterprises Inc. is majority owned by the Indian company, Hemkunt Exim [P]rivate Limited."

- The petitioner submitted Tax Form 1120, Schedule K, indicating that the foreign entity owns 33.0 percent of the U.S. entity.
- The stock certificate shows that on November 14, 2001, the foreign entity is the owner of 50,000 shares of the petitioner's capital stock. In the minutes of the first meeting, under the provision of authorization of issuance of the shares, the petitioner sold 50,000 shares to the foreign entity in exchange for \$5,000.
- The foreign entity's memorandum of association, dated January 18, 1999, and notarized January 25, 2001, indicated that the beneficiary took 100 equity shares and [REDACTED] took 100 equity shares.
- The minutes of the meeting for the foreign entity on May 11, 2001 provide that 62,300 equity shares were allotted to the beneficiary and 34,256 equity shares were allotted to [REDACTED]. These minutes were dated February 7, 2001.

(Emphasis added.) On review, the record as presently constituted is not persuasive in demonstrating that the petitioner has established that a qualifying relationship exists between the U.S. and foreign entities. The petitioner did not provide sufficient evidence to establish ownership and control of the U.S. entity. There is no evidence to prove that the 50,000 ownership units were actually transferred to the foreign entity in exchange for \$5,000. Although the petitioner submitted a stock certificate, the U.S. Corporate Tax Form 1120, Schedule L, line 22, indicated that at the end of the tax year, the U.S. entity did not sell any stock. Therefore, the tax return does not reflect the amounts indicated on the stock certificate. As a result, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and 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, 591-92 (BIA 1988).

Further, there is also insufficient evidence to establish that the U.S. entity is a subsidiary or affiliate of the foreign entity. The term "subsidiary" is a specific form of affiliation in that the entity described is subordinate to

the control of another. It is stated in the record that the petitioner is either "wholly," "partially," or "33%" owned by the foreign entity. This evidence indicates that it is unclear as to what percent of the U.S. entity, if any, the foreign entity or others owns and controls. As explained earlier, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho, supra*. Therefore, after careful consideration, the AAO is not persuaded that the petitioner has demonstrated that a qualifying relationship exists between the United States and foreign entities. For this reason, the petition may not be approved.

The fourth issue is whether the petitioning organization is doing business.

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

(F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

. . . .

(H) Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

In his decision, the director determined that the evidence did not establish that the U.S. entity was doing business as required. The director found that the photos submitted by the petitioner failed to show the inside and outside of the entities, and that the equipment, merchandise, products, and employees were not visible.

Despite the director's findings, the critical focus in the definition of "doing business" is not whether the petitioner is an agent or representative office, but whether the entity constitutes the mere presence of an agent or office without conducting any business activities. The director incorrectly concluded that the photographs did not represent that the petitioner was doing business. Therefore, the AAO withdraws this portion of the director's decision.

Beyond the decision of the director, the AAO observes that the petitioner did not submit sufficient evidence to establish that the petitioner has secured sufficient physical premises to house the U.S. entity. The regulations state that, if 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 must submit evidence that sufficient physical premises to house the new office have been secured. See 8 C.F.R. § 214.2(1)(3)(v). The petitioner submitted a copy of a commercial lease and photos. The commercial lease, signed November 15, 2001, was made between K.N. Properties and the beneficiary doing business under the name of the U.S. entity. The commercial lease indicates that the property for lease is located at [REDACTED] and that notice shall be served upon a [REDACTED]

However, the lease does not indicate when the lease will commence and when the lease will end or when the \$750 agreed payment and \$1500 deposit shall be paid.

In addition, the petitioner's address was indicated on Form I-129 as [REDACTED] however, the petitioner did not indicate a suite number. In addition, the petitioner submitted photographs of the leased premises. The photographs do not show an identifying suite number but do show the premises as occupied with office equipment and personnel. However, the photographs, showing the claimed premises as occupied, are inconsistent with the incomplete commercial lease agreement. There is no evidence to show that the petitioner is paying for the 700 square feet it claims to occupy. As the appeal will be dismissed, the AAO will not examine this issue any further.

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.