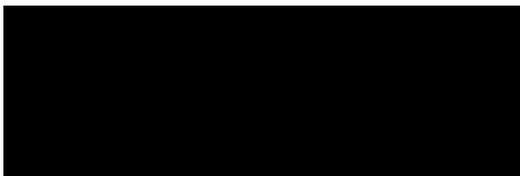


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Washington, DC 20536

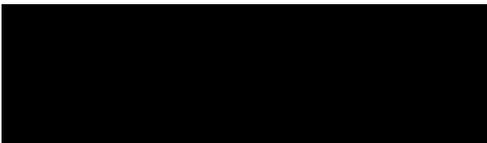


U.S. Citizenship
and Immigration
Services



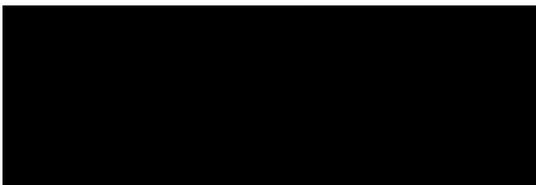
FILE: LIN 02 093 52916 Office: NEBRASKA SERVICE CENTER Date: **MAR 24 2004**

IN RE: Petitioner:
Beneficiary:



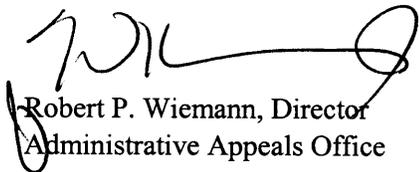
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner, Shah Associates, Inc., avers that it is the wholly-owned subsidiary of an Indian company, Shah Associates. The petitioner plans to operate a convenience wholesale and retail business. The U.S. entity was incorporated in the State of Illinois on January 3, 2002. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, in January 2002, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for an unstated period. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's executive manager at an annual salary of \$35,000.

The director determined that the petitioner will not support an executive or managerial position within one year. Also, the director concluded that the petitioner had failed to submit a well defined business plan. Consequently, on August 23, 2002, the director denied the petition.

On appeal, petitioner's counsel asserts that petitioner will support an executive or managerial position within one year and the petitioner had submitted a well-documented business plan.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

Under 8 C.F.R. § 214.2(l)(3), an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority of the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraph (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

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.

The petitioner initially submitted limited and nonspecific evidence on the issue of whether the intended United States operation will, within one year of the approval of the petition, support an executive or managerial position. As a result, on February 26, 2002, the director issued a request for evidence. In particular, the director requested detailed documentary evidence for each of the elements under 8 C.F.R. § 214.2(l)(3)(v).

In response, the petitioner submitted an October 21, 1996 sublease for the term October 21, 1996 through May 23, 1998 for the store premises at 927 Davis Street, Evanston, Illinois. Ali Mohd and Shameem Ali appear to have signed the sublease as tenants, while a vice president of White Hen Pantry, Inc., signed the sublease as landlord. Additionally, the petitioner submitted an August 1, 1996 draft lease for the period May 24, 1996 through May 31, 2003 for the store premises at 927 Davis Street, Evanston, Illinois. Ali Mohd signed the draft document as lessee, while James R. Nash signed the draft document as lessor. Finally, the petitioner proffered a lease for an apartment in Chicago, Illinois, for the period July 7, 2002 through April 30, 2002. The beneficiary signed the lease as tenant.

The sublease and two leases cannot establish that the petitioner has obtained sufficient physical premises to house the new office. Specifically, the sublease and leases present inconsistent, undocumented, and irrelevant information. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988). Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

First, the lessees who signed the October 21, 1996 sublease and the August 1, 1996 draft lease appear to have an unclear relationship with the petitioner. The following evidence suggests an unclear relationship:

- On April 19, 2002, the lessees sold 100 shares of Davis Pantry, Inc., to the petitioner.
- The record indicates that the sublease and lease were executed approximately six years prior to the stock sale.

- The documentation does not clearly indicate whether the lessees sold all of Davis Pantry's stock to the petitioner.
- The record does not indicate that the lessor substituted Shah Associates as the lessee.
- Although a lessor and lessees signed a lease for the period May 24, 1996 through May 31, 2003, the petitioner did not explain why it submitted a draft lease instead of an executed lease.

Second, the dates on the sublease and lease are inconsistent. The sublease is for the period October 21, 1996 through May 23, 1998 while the draft lease is for the period May 24, 1996 through May 31, 2003. The petitioner failed to explain why the effective dates of the two leases overlap.

Third, the beneficiary's apartment lease is of no evidentiary value as it is for residentially zoned premises rather than for commercially zoned premises. In sum, the conflicting and undocumented evidence fails to demonstrate that the petitioner obtained sufficient physical premises to open its new office.

The AAO now turns to question of whether the petitioner provided sufficient supporting information pursuant to 8 C.F.R. § 214.2(l)(3)(v)(C). Initially, the foreign entity submitted a January 7, 2002 letter that presented the petitioner's business plan:

- [The petitioner has] already incorporated [its] business in the city of [C]hicago in [the] USA.

* * *

- Potential US distributors, agents and clients have been contacted telephonically and preliminary proposals and negotiations and feasibility studies are already underway in this regard and in anticipation of [the beneficiary's] commencement of his duties upon the approval of his visa.
- Convenient Store [*sic*] is being negotiated for buying as an initial step towards expanding [the foreign entity's] business in [the] USA and later some more and diversified business [*sic*] will be bought to strengthen [the foreign entity's] investment.

As noted earlier, the director requested additional information about the petitioner's business plan. On May 17, 2002, the petitioner's counsel presented additional information about the business plan:

[The beneficiary] will join [the petitioner] on a temporary assignment to fill the position of initial organizer, executive and manager. [The beneficiary] will be responsible for opening new accounts with North American [and] European markets for the existing product sales for Medical Supplies, exporting medical supplies and instruments to India, [the] Middle East, and other countries, as well as develop [the petitioner's] presence in other business areas, including retail of general merchandise, restaurants, and manufacturing.

* * *

[The beneficiary], on behalf of [the petitioner], has purchased [its] first business in the United States. Shah Associates purchased a controlling interest in Davis Pantry, Inc.

* * *

[The petitioner] will invest in strategic investments, with existing management with a proven track record.

* * *

With the businesses in the U.S., [the beneficiary] will continue to purchase businesses with existing management, and form strategic partnerships for joint ventures into new business areas such as [r]etail, restaurants, and manufacturing, while concurrently expanding the [h]ospital/[m]edical [s]upplies business.

The precedent decision, *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm. 1998), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho, Id.*, addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements.

The business plans supplied above lack specificity. For instance, rather than set forth timetables, staffing requirements, organizational structure, or job descriptions, the plans list such undefined goals as making contacts "telephonically," drafting "preliminary proposals," and conducting "negotiations and feasibility studies." Furthermore, the plan described on January 7, 2002 contradicts portions of the plan described on May 17, 2002. In particular, the January 7 plan indicates that the petitioner plans to purchase a convenience store; however, the May 17 plan states that the petitioner plans to market medical supplies in North America and Europe as well as export medical supplies and instruments to India, the Middle East, and other countries. Further, the May 17 plans claims that the petitioner will develop a presence in other areas including retail of general merchandise, restaurants, and manufacturing. Thus, it is unclear whether the petitioner intends to open a convenience store, an import-export business, or some other operation.

Similarly, the petitioner did not adequately document its investment in the United States or its ability to remunerate the beneficiary. The record contains several monthly bank statements from the Broadway Bank in Chicago; however, the statements are not for the petitioner but for Davis Pantry, Inc. Additionally, the record contains three cashier's checks drawn on the Broadway Bank. The checks show that the petitioner paid \$20,000 to Davis Pantry, Inc. Finally, an April 19, 2002 unanimous action by the shareholders of Davis Pantry, Inc., indicate that the petitioner paid Davis Pantry \$20,000 in exchange for 100 shares of stock. These actions may suggest a link between the petitioner and Davis Pantry, Inc. The AAO notes, however, that the petitioner is Shah Associates, Inc., not Davis Pantry, Inc. Therefore, the transactions between the petitioner and Davis Pantry fail to document whether the foreign entity invested money in the U.S. entity or whether the U.S. entity has the ability to remunerate the beneficiary. The AAO acknowledges that the petitioner

submitted an organizational chart for the foreign entity.¹ The organizational chart lists only names and titles; therefore, it sheds no light on the petitioner's ability to support a manager or executive. In sum, the lack of documentation and inconsistent evidence indicates that the petitioner would be unable to support a manager or executive within one year of the approval of the petition.

Finally, on appeal counsel cites an unpublished case to support its position that the beneficiary is a manager and executive. Although AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. 8 C.F.R. § 103.3(c). Given that the cited case is unpublished, it has no precedential effect in this matter.

Beyond the decision of the director, the AAO notes that the petitioner inadequately documented the duties the beneficiary will perform during his first and later years in the United States. The AAO acknowledges that, during the first year of operation, a beneficiary may perform some duties which are not normally managerial or executive. See 8 C.F.R. §§ 214.2(l)(3)(v)(C)(1), (2), and (3). However, the foreign entity's January 7, 2002 letter addressed to CIS, the January 7, 2002 assignment letter addressed to the beneficiary, and the January 7, 2002 organizational chart listed generalized marketing duties and paraphrased the statutory definitions of "managerial" and "executive" capacity. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. As established earlier, generalities are insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*.

Similarly, the May 13, 2002, December 28, 2001, and the January 7, 2002 letters from the foreign entity, as well as counsel's May 17, 2002 letter, state that the beneficiary works for the overseas operation as an "executive manager" and as an "executive level employee." The letters provided no documentation to support these assertions; therefore, the record lacks 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. See 8 C.F.R. § 214.2(l)(3)(iii).

Also, beyond the decision of the director, the AAO notes that two January 7, 2002 letters from the Indian company assert that the foreign entity owns 100 percent of the petitioner's stock. However, the record lacks evidence that typically documents a qualifying relationship: board of directors' minutes, stock ledgers, and stock certificates. Based on this lack of documentation, the AAO concludes that it is questionable whether a qualifying relationship exists between the U.S. and Indian entities. See 8 C.F.R. § 214.2(l)(1)(ii); *Matter of Treasure Craft of California, supra*.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

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¹ The AAO agrees that with counsel that the director misinterpreted part of the organizational chart as depicting the U.S. entity's proposed organization. The AAO, therefore, withdraws the director's finding that the organizational chart represents the U.S. entity's proposed structure. The AAO finds, however, that the director's decision presents no further errors.