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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

MAR 3 1 2004

FILE: SRC 02 143 53531 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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

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DISCUSSION: The Director, Texas 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, Yam Foods, Inc., avers that it is the branch office of an Indian company, Sheriyas Ice Cream Parlour.[1] The petitioner states that it sells groceries, beverages, and gasoline. The U.S. entity was incorporated in the State of Georgia on August 11, 2000. The petitioner now seeks to hire the beneficiary as a new employee.[2] Consequently, in April 2002, the U.S. entity filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's vice president at an annual salary of $30,000.

On August 27, 2002, the director concluded, however, that the beneficiary will not perform executive duties in the United States. Consequently, the director denied the petition.

On appeal, the petitioner's counsel asserts that the beneficiary's proposed duties in the United States will be primarily executive.

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 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.
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> (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.
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> (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.
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> (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

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[1] As discussed in this decision, the petitioner is not a branch office and has no qualifying relationship with the Indian entity.

[2] As explained in this decision, the petitioner erroneously indicated on Form I-129 that the beneficiary was coming to the United States to open a new office.

> States; however, the work in the United States need not be the same work which the alien performed abroad.

The Form I-129 states that the beneficiary is coming to the United States to open a new office. However, when the petition was filed, the petitioner had already been doing business for more than one year. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). Specifically, the petitioner filed a Form 1120 U.S. Corporation Income Tax Return for the tax year beginning August 1, 2000 and ending July 31, 2001. Thus, the beneficiary apparently is not in the United States to open a new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). The AAO will, in turn, treat this matter as a new employment petition. 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-
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> i. directs the management of the organization or a major component or function of the organization;
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> ii. establishes the goals and policies of the organization, component, or function;
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> iii. exercises wide latitude in discretionary decision-making; and
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

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-
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> 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;
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> 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
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> 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.

The petitioner makes no claim that the beneficiary will serve in a managerial capacity; therefore, the only question that the AAO will address initially is whether the beneficiary will primarily work as an executive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the beneficiary's job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

On Form I-129, the petitioner stated that the beneficiary's duties in the United States will be to "oversee, direct and implement company policies on a day to day basis." A March 1, 2002 letter attached to Form I-129 identified the beneficiary's proposed titles as "president and executive director" and "chief executive officer of the new U.S. corporation"; however, as noted earlier, the Form I-129 depicted the proposed position as "vice president." The March 1, 2002 letter and the Form I-129 claim the proposed salary will be $30,000 per year. The March 1, 2002, letter described the beneficiary's proposed duties as:

- Establish policies and procedures for marketing, sales, inventory requisition, contract procurement and contract negotiation;
- [Invest] . . . funds at commercial terms as and when necessary;
- Direct the hiring, firing, supervision and placement of employees;
- Develop, implement and revise as necessary company policies, procedures and business plans;
- Oversee and evaluate the implementation of company policies, procedures and plans and provide ongoing assessment as to the extent to which same are achieved;
- Formulate strategies to establish and develop the new enterprise and oversee the implementation of such strategies;
- Plan, develop and implement business expansion strategies for new enterprise[s], oversee staffing, and investigate adding potential additional locations once the main retail establishment is in place;
- Research and develop plans to establish and expand regional sales, including company promotional and marketing schemes;
- Investigate market factors to analyze and make decisions with regard to business investments and the import and export of goods;
- Direct, oversee and be solely responsible for the day-to-day control and development of [the petitioner];
- Evaluate, assess and revise current financial operations, budget, procedures, policies, accounts and other aspects of the enterprise on an on-going basis with a view toward achieving corporate goals.

The director determined that the above descriptions were inadequate to establish that the beneficiary would be performing executive duties. Consequently, on May 28, 2002, the director issued a request for evidence. Specifically, the director asked the petitioner to list all of its current employees and to state their job titles. In response, the petitioner listed two employees, their titles, and their duties:

Humera Savaja, Manager

- General administration
- Attend [to] daily correspondence [and] respond [to] the same
- Banking and finance
- Maintain daily account
- Maintain public relations with jobber, [company] representatives and other suppliers
- Weekly purchase
- Keep track and control of inventory
- Co-ordinate with cashier for daily routine work
- Upkeep of the property
- Anything and everything to run business efficiently

Rahim A. Pirani, Cashier

- Handle cash register
- Attend customers and maintain good public relations
- Promote and sell new and regular products on deal [*sic*] to all customers
- Check all supplies from vendors and display for sales
- Make list of goods required for sales
- Co-ordinate with manager for daily routine work
- Help and assist manager as and when required

On appeal, the petitioner's counsel asserts that the beneficiary's proposed duties are primarily executive. Counsel supports this position by restating *verbatim* the list of proposed duties depicted in the March 1, 2002 letter. The assertions of counsel do not, however, constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

At the outset, the AAO observes that it is unclear what position the beneficiary will hold in the United States. As established above, the petitioner indicated the beneficiary may serve in one or more of four possible jobs: (1) chief executive officer; (2) executive director; (3) president; or (4) vice president. 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).

The job duties depicted above establish that the beneficiary will devote a substantial portion of his time to marketing. For example, he will conduct "contract procurement and contract negotiation," pursue "business expansion strategies," "investigate market factors," and institute "company promotional and marketing schemes." Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. Additionally, the beneficiary will be performing tasks necessary to produce a product or provide a service. For instance, he will "[invest] . . . funds" as well as "evaluate, assess and revise current financial operations, budget . . . [and] accounts." An employee who primarily performs the tasks necessary to

produce a product or 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).

Additionally, the duties listed above are too broad and nonspecific to convey an understanding of the beneficiary's proposed daily responsibilities. As an illustration, several elements of the proposed duties characterize the beneficiary as creating "policies," "procedures," "strategies," and "goals"; the petitioner fails, however, to quantify these terms. Likewise, the proposed duties frequently depict the beneficiary as "direct[ing], "develop[ing]," and oversee[ing]" tasks; nevertheless, the petitioner does not define these terms. Additionally, the petitioner generally 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. For example, the petitioner depicted the beneficiary as having full authority to hire, fire, and supervise employees as well as exercise complete discretionary authority over corporate policy.

Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS,* 48 F. Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS,* 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, specifics are an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava,* 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd,* 905 F.2d 41 (2d. Cir. 1990).

Even though the petitioner claims only that the beneficiary will serve as an executive, the AAO notes that the U.S. entity has not demonstrated that the beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. *See* section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea,* 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling,* 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin,* 11 I&N Dec. 686 (D.D. 1966).

The petitioner indicates that it currently has two employees: (1) Humera Savaja, a manager; and (2) Rahim A. Pirani, a cashier. Neither employee performs professional, managerial, or supervisory tasks; instead, the two employees perform daily activities necessary to provide a service or produce a product. For example, the manager primarily performs basic accounting activities, while the cashier sells products to customers. Both employees monitor inventory needs for the U.S. entity. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra.* Thus, the two potential subordinate employees would be unable to relieve the beneficiary from performing nonqualifying duties. At most, the beneficiary would serve as a first-line supervisor.

In sum, the beneficiary's conflicting job titles, marketing and production-oriented duties, vaguely defined responsibilities, and apparent lack of professional, managerial, or supervisory personnel preclude CIS from classifying the beneficiary as an executive.

On appeal, counsel asserts that the director erroneously concluded that the beneficiary supervised too few employees to qualify as an executive or manager. The AAO recognizes that an entity's size does not necessarily decide the question of managerial or executive capacity. As established previously, however, the beneficiary is performing tasks required to provide a service or produce a product; thus, regardless of the U.S. entity's size, the petitioner has not established that the beneficiary is primarily functioning as an executive or a manager.

Finally, on appeal, counsel states, "In the absence of evidence to the contrary, the petitioner's statements with respect to the job duties of the beneficiary must be accepted." In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As shown above, the petitioner has failed to prove by a preponderance of evidence that the beneficiary will perform primarily executive duties.

Beyond the decision of the director, the AAO observes that the beneficiary has not served at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition in a managerial or executive position. *See* 8 C.F.R. §§ 214.2(l)(3)(iii) and (iv). The AAO will first discuss whether the beneficiary has served in a managerial or executive position abroad. Second, the AAO will examine whether the petitioner has a qualifying relationship with a foreign organization.

On Form I-129, the petitioner stated that the beneficiary's duties abroad are to "direct, manage and oversee the day to day activities of [the] company." The March 1, 2002 letter attached to Form I-129 added, "[The beneficiary] has controlled and directed [the Indian entity] since 1994, overseeing and developing the day to day operations of the foreign enterprise." Additionally, the petitioner submitted a chart depicting the Indian entity's organization. The chart listed six employees besides the beneficiary. The chart identified the beneficiary as the entity's president and described his duties as:

> Manage and direct the day to day operations of the company. Direct, control and oversee all sales department, finance department and administrative department. Hire, fire, direct, control and oversee management staff. Establish, implement and revise company policies, protocols and procedures. Develop and direct each and every aspect of company operations, growth, development and organization.

The duties abroad present the same deficiencies as the proposed U.S. duties. In particular, the tasks are vague, paraphrase the regulations and the statute, and focus on providing a service or producing a product. *Matter of Church Scientology International, supra*; *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra; Fedin Bros. Co., Ltd. v. Sava, supra*. Similarly, the descriptions of the six other employees are undefined; thus, it is unclear whether any or all of the six employees can relieve the beneficiary of his nonqualifying duties. *See* section 101(a)(44)(A)(ii) of the Act. In sum, the beneficiary has not served in a managerial or executive capacity abroad. However, as the appeal will be dismissed, the AAO will not examine this issue any further.

Also, beyond the decision of the director, the AAO concludes that it is questionable whether a qualifying relationship exists between the U.S. and Indian entities. The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
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> > (*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
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> > (*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.
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> * * *
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> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
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> (J) *Branch* means an operation division or office of the same organization housed in a different location.
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> (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.
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> (L) *Affiliate* means
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> > (*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 regulations 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 nonimmigrant visa petition. *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, 595 (Comm. 1988) (in immigrant visa proceedings). In the 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.*

The record contains inconsistent evidence regarding the structure and ownership of the U.S. and Indian entities. As noted previously, 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, supra.* The evidence indicates that:

- The beneficiary and his wife established a 50-50 partnership in the Indian entity on July 15, 1994.
- The petitioner claims on Form I-129 to be the branch office of the Indian entity.
- On October 10, 2000, the petitioner authorized the issue of 1,000 shares.
- On October 10, 2000, the petitioner issued stock certificate number one to the beneficiary for 500 shares.
- On October 10, 2000, the petitioner issued stock certificate number two to Shams Savaja for 500 shares.
- On January 12, 2002, a tax preparer signed a Year 2000 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Return on the petitioner's behalf. The tax form was for the period beginning August 1, 2000 and ending July 31, 2001.
- Schedule K of the Year 2000 IRS Form 1120 stated that Shams Savaja owned 100 percent of the petitioner.

Branch offices are not incorporated in the United States and must file IRS Form 1120-F, rather than IRS Form 1120; therefore, the evidence establishes that the petitioner is not a branch office.

As indicated above, two persons own equal shares in the Indian entity. Similarly two persons own equal shares in the U.S. entity. However, only the beneficiary owns a share in both entities. Thus, the record does not show that the two companies are 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 proportion of each entity. No affiliate relationship, therefore, exists between the two companies.

The Indian entity does not own a majority of the stock or a controlling block of stock in the U.S. entity. Likewise, the U.S. operation does not own a majority of the stock or a controlling block of stock in the Indian company. Consequently, no subsidiary relationship exists between the two entities. *See* 8 C.F.R. § 214.2(l)(l)(i).

Finally, even though the record contains two certificates indicating that two persons own equal amounts of stock in the petitioner, the Year 2000 IRS Form 1120 Schedule attributes 100 percent stock ownership in the petitioner to one person. This discrepancy casts doubt on the veracity of the evidence. In sum, the discrepancies in the ownership evidence and the lack of a branch, affiliate, or subsidiary relationship suggest that no qualifying relationship exists. However, 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.

ORDER: The appeal is dismissed.

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