



U.S. Citizenship  
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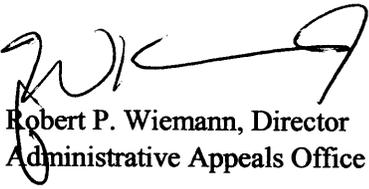
IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner claims to be engaged in the business of selling tobacco and tobacco accessories. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had not established the following factors: 1) that the petitioner has a qualifying relationship with a foreign entity; 2) that the petitioner had been doing business for the year prior to filing the petition to extend the beneficiary's authorized stay; 3) that the foreign entity is currently doing business; and 4) that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's decision and provides additional evidence.

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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The U.S. petitioner states that it was established in 2001 and indicates in the petition that it is an affiliate of Hotel Al Taiba, located in India. The initial petition was approved and was valid from March 18, 2001 to March 18, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of \$18,000.

The first issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with a foreign entity.

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

*Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

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

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

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

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

*Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

*Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In a statement submitted in support of the petition the petitioner claimed that the beneficiary owns controlling interests in both the petitioning organization and in the foreign organization. Due to poor organization of the documentation on record, the AAO cannot determine whether the petitioner actually submitted its Articles of Incorporation and stock certificates initially, as indicated in the list of exhibits submitted with the initial

petition, or whether such documentation was submitted in response to the director's request for additional evidence. The record does indicate, however, that the petitioner submitted its 2001 income tax return, which failed to indicate that the petitioner is owned, at least in part, by a foreign person or entity.

On June 11, 2002 the director issued a request for additional evidence instructing the petitioner to submit stock certificates it previously issued. The petitioner complied by submitting the requested stock certificate that indicates that the beneficiary owns 1,000 shares of the petitioner's stock.

The director denied the petition basing her decision, in part, on the determination that the petitioner failed to submit sufficient evidence to establish that the beneficiary owns and controls 100 percent of the U.S. and foreign entities. While common ownership and control are key to establishing an affiliate relationship between two companies, it is not necessary for two companies to be wholly owned by the same person or entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L). Nevertheless, the director's overall conclusion that the record lacks sufficient evidence of a qualifying relationship is correct.

On appeal, counsel states that the beneficiary owns 60 percent of the foreign entity and claims that the beneficiary is a majority owner of the petitioning entity. To support the ownership claim regarding the foreign entity the petitioner submits a statement from the accounting firm hired by the foreign entity. However, 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). Although the accounting firm's statement supports the petitioner's claim regarding the beneficiary's ownership interest, it is merely an extension of the petitioner's own claim and cannot be deemed as documentary evidence. The petitioner submitted no other evidence regarding the beneficiary's claimed ownership interest in the foreign entity.

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 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 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* at 595. In the instant case, the record lacks sufficient evidence to establish that the beneficiary owns and controls the foreign entity. Therefore, it cannot be determined that the foreign and petitioning entities are similarly owned and controlled. For this reason, the petition cannot be approved.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it had been doing business for the year prior to filing the petition.

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

*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.

Although the petitioner submitted its 2001 tax return and a number of its bank statements in support of the initial petition, such documentation does not establish whether the petitioner is engaged in the sale of tobacco and tobacco accessories on a regular, systematic, and continuous basis. Therefore, the director instructed the petitioner to submit additional evidence in regard to this issue. While the director had cause to request documentation from 2001, the year of the petitioner's incorporation, the director requested documentary evidence starting from the year 1998. As the petitioner was not yet established during that year, the director's request for documents prior to 2001 was not reasonable. Therefore, the petitioner is under no obligation to comply with a request for documents for any years prior to 2001.

The petitioner's response included a copy of its State of Texas sales and use tax return for the last quarter of 2001 and its State of Texas franchise information report. While the various state tax statements suggest that the petitioner engaged in some form of sales, there is no indication that it did so continuously throughout the entire year prior to filing the instant petition. The petitioner also submitted additional bank statements. However, in light of the retail nature of the petitioner's business, bank statements do not accurately document whether the petitioner has regularly engaged in selling its merchandise during the pertinent one-year time period. While the director pointed to the issue of doing business as one of the grounds for denying the petition, the petitioner did not address this issue on appeal. Therefore, the petitioner has failed to establish that it has been doing business during the relevant time period. For this additional reason, this petition may not be approved.

The third issue in this proceeding is whether the foreign entity has continued to engage in the regular course of business. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). In response to the director's request addressing this issue, the petitioner submitted a number of the foreign entity's tax documents, monthly payroll statements, and a number of sales invoices reflecting sales that took place in the years 2001 and 2002. Therefore, based on the evidence submitted in response to the request for evidence, the AAO concludes that the director's determination that the petitioner did not submit sufficient evidence to establish that the foreign entity is doing business is incorrect and will hereby be withdrawn.

The final issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly

supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the petition, the petitioner provided the following description of the beneficiary's job duties:

The Beneficiary will continue to be employed as the President of the Petitioner, and will be responsible for performing the following duties for the Petitioner; [sic] such duties include: hiring and firing managers; supervising subordinate employees; overseeing preparation of sales and inventory reports; reviewing an [sic] analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate employees; managing the company; and overseeing marketing campaign developed by subordinate managers.

Although instructed by the director to identify who performs the actual operational tasks of the petitioner's business, and who manages the employees that perform those tasks, the petitioner failed to respond to this portion of the request for additional evidence. As previously indicated, the director subsequently denied the petition, basing that denial, in part, on the petitioner's failure to submit sufficient evidence to establish that the beneficiary would primarily perform managerial or executive duties. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner is a retail operation that has a total of three employees. While the size of the petitioner's business and the small number of personnel cannot serve as the sole reasons for denying the petition, these factors can and should be considered in order to determine who is performing the non-qualifying operational tasks of the petitioner's business. In the instant case, the record suggests that the beneficiary manages two employees who assist with selling the petitioner's product. However, the vague description of the beneficiary's duties does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. While the petitioner was allowed the opportunity to indicate who actually performs the petitioner's daily operational tasks, it failed to provide these necessary facts. As such, the AAO is unable to determine what duties the beneficiary, and the petitioner's other employees, actually perform on a daily basis. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. Nor has the petitioner determined that the beneficiary will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. The record does not demonstrate that the beneficiary primarily manages an essential function of the organization or that he operates at a senior level within an organizational hierarchy. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this additional reason, this 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.