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U.S. Citizenship and Immigration Services

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FILE: SRC 02 216 51478 Office: TEXAS SERVICE CENTER Date: OCT 21 2004

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:

SELF-REPRESENTED

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 was initially approved to open a "new office." The "new office" approval was granted from July 12, 2001 to July 12, 2002. The "new office" petitioner is an organization incorporated in September 2000 in the State of Florida that was dissolved in September 2001. The petitioner of this proceeding claims that it is the same corporation but that it has been re-registered in the State of Georgia in March 2002. The Georgia corporation operates a restaurant in Atlanta, Georgia. It seeks to extend the employment of the beneficiary temporarily as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims that it is a wholly-owned subsidiary of Country Oven, CC, located in Bryanston, South Africa.

The director denied the petition after determining that: (1) the beneficiary had not maintained his status as an employee of the approved company incorporated in Florida; (2) the evidence in the record did not show that the Florida corporation and the foreign entity are still qualifying organizations; (3) the evidence in the record did not show that the Florida corporation had been doing business for the previous year; (4) the evidence in the record did not establish that the foreign entity continued to do business; (5) the petitioner had not established that the beneficiary had been and would continue to be employed in a primarily managerial or executive capacity; and, (6) that the beneficiary had not persuaded the director that he intended his employment to be temporary.

On appeal, the petitioner asserts that the beneficiary's L-1 visa application and extension petition were badly prepared due to the petitioner's ignorance of immigration laws and its trust in its former legal counsel.<sup>1</sup> The petitioner also submits documentation for consideration.

The director first determined that the beneficiary had not maintained his status as an employee of the previously approved company that was incorporated in Florida. The director observed that the original new office petition was approved in July 2001 for a company incorporated in Florida that was administratively dissolved in September 2001. The director noted that the beneficiary arrived in the United States in March 2002 and established a company in the State of Georgia. The director referred to the approval notice that

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<sup>1</sup> The record contains a document titled "Motion to Reconsider and/or Reopen Decision Dated and Mailed 03/07/03." This document does not bear a date stamp as officially received with fee by Citizenship and Immigration Services (CIS). The document is dated August 11 (absent a specified year); an attached letter is dated August 15, 2003. The attorney who submitted the Motion to Reopen and/or Reconsider also submitted a Form G-28, Notice of Entry of Appearance as Attorney or Representative. The Form G-28 indicates that the attorney is representing the beneficiary as "respondent." The "affected party" in visa petition cases is the petitioner, and the beneficiary does not have standing to move to reopen the proceedings. *Matter of Dabaase*, 16 I&N Dec. 720 (BIA 1979). The petitioner is the party-in-interest in the proceeding before the AAO, not the beneficiary. See 8 C.F.R. § 103.3(a)(1)(iii)(B). As CIS records do not reflect a dated receipt of this document and as the attorney appears to represent only the beneficiary in this matter, the motion and arguments contained therein, as well as the exhibits attached to the motion, will not be considered.

states: "Petition approval does not authorize employment. When workers are granted status based on this petition they can then work for the petitioner, but only as detailed in the petition and for the period authorized. . . . Changes in employment require a new petition." The director concluded that the beneficiary had not complied with the terms of the approval of the new office petition, thus the beneficiary had not maintained his status as an employee of the company approved in the new office petition. Whether the beneficiary has maintained his status pursuant to an approved petition is not an issue subject to appeal. 8 C.F.R. § 214.1(c)(5). The AAO does not have subject matter jurisdiction to address this issue. The director's decision on this issue will not be disturbed.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. In addition, 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.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, that 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 position held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue on appeal is whether the foreign entity is continuing to do business. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner has submitted sufficient evidence on appeal to establish that the foreign entity continues to operate a restaurant in South Africa. The petitioner has overcome the director's determination on this point and the director's decision will be withdrawn as it relates to this issue.

The second issue on appeal is whether the petitioner provided sufficient evidence that the beneficiary's position would be temporary. *See* 8 C.F.R. § 214.2(l)(3)(vii). The petitioner has provided sufficient evidence on this issue. Again, the director's decision will be withdrawn as it relates to this issue.

The third issue on appeal is whether the United States and foreign entities are still qualifying organizations.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (G) *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.

(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 validity of the approval of the initial nonimmigrant petition that involved opening a “new office” expired on September 21, 2002. The issue in this proceeding is whether the petitioner has established that it had been doing business for the previous year.

The record demonstrates that the petitioner for the new office petition was Country Oven, Inc., a company incorporated in the State of Florida in September 2000. The Florida company issued 100 shares of stock to Country Oven C.C., a company located in South Africa, thereby creating a parent-subsidary relationship. The record contains confusing information regarding the ownership of the foreign entity. Teresa Taoushiani appears to be the only member of the South African “close corporation.” However, the record also contains a June 18, 2000 accounting report that identifies Taoushiani Zacharias, the beneficiary, as the South African company’s only member. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

When the extension petition was filed, the petitioner was identified as Country Oven, Inc., a company established in the State of Georgia in 2002. In a July 2, 2002 letter appended to the petition, the petitioner’s former counsel acknowledged that the subsidiary U.S. company was originally a Florida corporation. The petitioner indicated, however, that the company had re-registered in the State of Georgia. Previous counsel asserted that the ownership of the corporation remained identical to the original submission and that it retained its original relationship to the South African corporation. However, the record contains a specimen stock certificate issued by the Georgia corporation to Zacharias Taoushiani, not the South African company, in the amount of 1,000 shares. The Georgia company’s Articles of Incorporation also identify Zacharias Taoushiani as the only subscriber of 1,000 shares. The Articles of Incorporation were filed in July 2002. Because the petitioner is directly owned by the beneficiary, it has not established that it is a subsidiary of the South African company, as claimed in the original new office petition.

The director noted the above, as well as the fact that the Florida corporation had been administratively dissolved in September 2001. The director determined that the record did not substantiate that a qualifying relationship continued to exist between the original new office and the foreign entity.

On appeal, the petitioner states that the foreign entity continues to operate as a family business and that although Theresa Taoushiani "officially" owns the South African business, both the beneficiary (Zacharias Taoushiani) and Theresa Taoushiani own the foreign entity jointly.

The petitioner's assertion and statement are not persuasive. The Florida corporation and the Georgia corporation are separate legal entities.<sup>2</sup> A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). The dissolution of the Florida corporation terminated its existence. The creation of a separate legal entity in Georgia cannot be substituted for the dissolved entity. Moreover, the record shows that the Florida corporation was owned and controlled by a foreign company, County Oven, CC, while the current record indicates that the beneficiary is the owner of the Georgia corporation. Accordingly, the record does not establish that a qualifying relationship continued to exist between the Florida corporation, dissolved in September 2001, and the foreign entity, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The director's decision to deny the petition is affirmed on this issue and the appeal will be dismissed.

The fourth issue on appeal is whether the United States entity, in this instance the Florida corporation, was doing business the year prior to the extension petition, July 2001 to July 2002. See 8 C.F.R. § 214.2(l)(14)(ii)(B).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) states: "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."

The director observed that the petitioner had not submitted evidence to show that the delay in the beneficiary's arrival to the United States was the fault of the United States consulate. The director also noted that the petitioner had not submitted evidence that the Georgia company was currently doing business.

On appeal, the beneficiary acknowledges that the Georgia company was established in July 2002 but asserts that the beneficiary had been operating the business since March 2002, shortly after the beneficiary's arrival.

The beneficiary's assertion that he had started operating the Georgia restaurant in March 2002 is not relevant to this proceeding. The Florida corporation, the original petitioner for a new office, was dissolved in September 2001. The dissolution of the petitioner undermines any claim that it continued to do business. As

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<sup>2</sup> The argument is made that both the Florida corporation and the Georgia corporation use the same employer's identification number (EIN) and as such should be treated as the same entity. However, the use of the same EIN tax identification number does not substantiate that a corporation dissolved in September 2001 and one created in July 2002 are the same legal entity.

noted above, the petitioner of interest is the Florida corporation and any businesses it might have operated. Further, even if CIS were to consider that the beneficiary's operation of Bailey's Family Restaurant beginning in March 2002, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, in this matter by July 2002, the petitioner is ineligible by regulation for an extension. The record indicates that the company that was previously approved to open a new office was dissolved and did not commence doing business within one year of the original petition's approval. For this additional reason, the appeal must be dismissed.

The final issue on appeal is whether the petitioner established that the beneficiary had been and would continue to perform in primarily an executive or managerial 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.

The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary would be the "operational manager of restaurant." On September 19, 2002, the director issued a notice of request for evidence and intent to deny. The director requested that the petitioner provide evidence of staffing of the U.S. company since July 2001. In response, the petitioner provided a list of thirteen employees, including the beneficiary. The employees hold positions of "manager server," "manager cook," "prep cook," server, and dishwasher. The beneficiary is listed as the "owner."

On appeal, the petitioner states the beneficiary's position as:

His basic role is to plan, direct, and achieve the organization's main goal, which is to successfully operate and establish a viable business entity in the U.S.A. that projects the same image and values of the parent company in South Africa.

His main function beyond this is to oversee the future growth of this U.S.A. subsidiary so that it can continue to expand in the U.S.A. to its fullest potential.

This includes conducting ongoing research and marketing; to identify future locations and other business opportunities for the Country Oven Inc., and to set up procedures to implement such plans.

He will then train and equip supervisory managers to run the daily operations of both the current location and future locations.

Until the current location is developed and operating to its fullest extent, [the beneficiary] will remain involved. He will also stay active in all aspects of the daily operating activities of Bailey's Restaurant.

The petitioner continued to state that the beneficiary is generally responsible for hiring, firing, payroll, buying, preparation of records for a CPA, training and preparation of operation manuals, customer promotions, and public relations.

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). The petitioner's description of the job duties 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. The petitioner's job description for the beneficiary's position does not establish that the beneficiary's position will be primarily managerial or executive.

The petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "plan, direct, and achieve the organization's main goal, which is to successfully operate and establish a viable business entity," and "oversee the future growth of this U.S.A. subsidiary." The petitioner does not, however, provide an understanding of the beneficiary's daily duties in obtaining these goals. 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). Specifics are clearly 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).

In addition, the petitioner indicates that the beneficiary will be "conducting ongoing research and marketing," and "stay active in all aspects of the daily operating activities of Bailey's Restaurant." The petitioner indicates that the beneficiary's daily operating activities include hiring, firing, payroll, buying, preparing records for the petitioner's accountant, training, preparing operation manuals, customer promotions, and public relations. Many of these daily duties are examples of an individual who carries out the petitioner's daily operational tasks. 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). The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description indicates that the beneficiary will perform non-qualifying duties. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has managed a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity.

Finally, it is noted that the petitioner bases this appeal, in part, on a claim that it received inappropriate advice from its previous counsel. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The petitioner has not met these criteria.

The AAO is sympathetic to the petitioner's claim that it received flawed legal advice with regard to its original petition. However, the petitioner's claimed ignorance of immigration law and its trust in its former legal counsel will not excuse a petition that does not meet the basic eligibility requirements for this visa classification. Although there are a number of unresolved issues in this matter, the record indicates that the Georgia corporation appears to maintain a small but thriving family restaurant that is highly appreciated by its local community. The AAO notes that this decision does not bar the Georgia restaurant from filing a new petition, accompanied by evidence of its eligibility, seeking an appropriate immigration classification.

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.