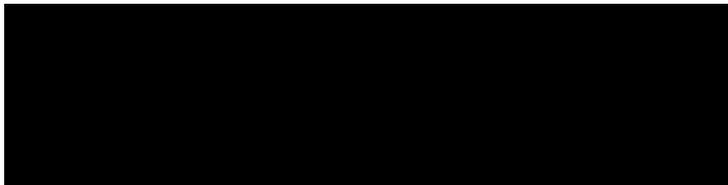


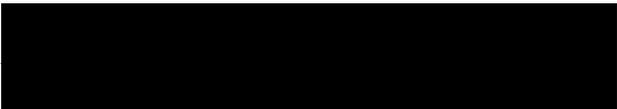


U.S. Citizenship
and Immigration
Services



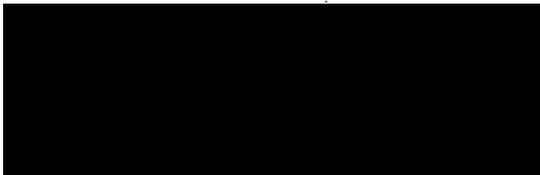
FILE: WAC 02 283 52049 Office: CALIFORNIA SERVICE CENTER Date: OCT 28 2004

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

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prevent disclosure of information
not intended for public release

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DISCUSSION: The Director, California 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 is a new U.S. office incorporated in the State of California in May 2002. It imports and sells tobacco. It seeks to temporarily employ the beneficiary 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 Ziad Zkaik & Co., a partnership located in Damascus, Syria.

The director denied the petition concluding: (1) that the petitioner had not demonstrated a significant commonality of ownership between the U.S. entity and the foreign entity, and therefore had not established a qualifying relationship; and, (2) that the petitioner had not shown it had the financial capacity to operate a viable business in the United States or to support the employment of executive/managerial personnel.

On appeal, counsel contends that the director's decision is erroneous.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. 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)(v) states if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

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

The first issue in this proceeding is whether a qualifying relationship exists between the foreign and U.S. entities.

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 petitioner stated on the petition and in a September 18, 2002 letter appended to the petition that the petitioning organization is a subsidiary of the beneficiary’s foreign employer. The September 18, 2002 letter also indicated that the beneficiary had opened a bank account for the petitioner with funds he had brought into the United States, as the direct transfer of funds was not permitted. The petitioner submitted: (1) a stock certificate issued by the U.S. company to the foreign entity for 1000 shares; (2) the beneficiary’s foreign bank

statements from January 1, 2001 to December 31, 2001 and January 1, 2002 to May 9, 2002 showing deposits and withdrawals; and (3) an August 28, 2002 bank letter showing that it had opened a checking account in August 2002 and had a current balance of \$12,956.07.

On January 21, 2003, the director issued a request for evidence, asking that the petitioner provide the customs declaration issued to foreign nationals who bring cash in excess of \$10,000 into the United States. The director also asked whether the funds had come from the beneficiary's own account in Syria and how these funds were sufficient to operate a company in the United States.

In an April 8, 2003 response, the petitioner through its attorney stated that the petitioner did not have the customs declaration that the director had requested. The petitioner, again through its attorney, indicated that the funds used to establish the U.S. entity were funds from the parent company's account, not that of the beneficiary. Counsel then referenced the beneficiary's bank statement submitted as an exhibit to the petition. Counsel also noted that the funds had been sufficient to obtain leased premises, purchase inventory and equipment, and open two commercial shops.

The director observed that the petitioner must be able to show that stocks issued by the petitioner had been paid for by the foreign entity and that the "parent company" had made a legitimate investment in the United States subsidiary. The director noted that the assets and liabilities of a corporation or partnership are separate from their stockholders or partners. The director determined that the evidence did not support the petitioner's claim that a subsidiary relationship exists.

On appeal, counsel for the petitioner contends that a stock certificate, pursuant to the California Corporations Code, is evidence of the ownership of the shares represented by it. Counsel asserts: "the fact that one partner used funds from his own account to benefit the partnership is evidence that the partnership benefited from the transaction."

Counsel also argues that the petitioner has presented ample evidence of the parent company's investment in the U.S. petitioner. Counsel states that the parent company's investment was demonstrated by the parent company opening the business account for the subsidiary; signing lease agreements and making lease deposits and payments; acquiring proper licenses and registrations; and, buying insurance policies and inventory.

Counsel's assertions are not persuasive. 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was

acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

The AAO acknowledges that the director mistakenly noted that the assets and liabilities of a partnership are separate from its partners. Neither a sole proprietorship nor a partnership is a legal entity apart from its owner or owners. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). However, the record in this matter does not establish that the funds from the beneficiary's personal account were used to benefit the foreign partnership, as counsel claims. The only evidence in the record that the foreign partnership owns the petitioner is a paper stock certificate and an accompanying stock ledger. There is no evidence in the record that the foreign partnership intended to invest in an overseas entity. There is no evidence in the record connecting any of the foreign entity's partners, other than the beneficiary, to the start up business in the United States.

Moreover, counsel's claim that the record contains ample evidence of the foreign entity's investment in the petitioner is without merit. The record does not contain any documentary evidence showing that the parent company opened a business account for the subsidiary; signed lease agreements or made lease deposits and payments; acquired proper licenses and registrations; or bought insurance policies and inventory. The record only contains items signed by the beneficiary on behalf of the subsidiary. Again, the petitioner has not provided sufficient evidence of the involvement of the foreign partnership in the start up of the petitioner. The record shows an investment made by a single individual to start the U.S. entity. The record does not establish the foreign entity's actual investment in the U.S. petitioner. 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). The record does not contain sufficient evidence establishing a qualifying relationship between the foreign entity and the U.S. petitioner.

The remaining issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition. As set out in 8 C.F.R. § 214.2(l)(3)(v)(C), to determine whether the intended United States operation will be able to support an executive or managerial position, the petitioner must submit information regarding:

- a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
- b. 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
- c. the organizational structure of the foreign entity.

In the September 18, 2002 letter appended to the petition, the petitioner explained that as general manager of the U.S. entity, the beneficiary would have "overall responsibility for the day-to-day operation of the U.S. entity." In addition, the petitioner indicated that in this capacity, the beneficiary would:

Be responsible for formulating and implementing the operating policies and goals of the new enterprise. He will have the final authority over staffing levels, and will have full autonomy over financial matters such as credit, banking, payroll and budgeting concerns. [The beneficiary] will also devote [a] significant portion of his time to negotiating and finalizing the parameters of [the petitioner's] contracts with sellers and purchasers of its tobacco products. He will also spend a portion of his time planning, organizing, directing and controlling the activities of independent contractors who perform essential functions necessary for the successful operation of [the petitioner's] business including accountants, customs brokers, and warehousing service providers.

In response to the director's request for additional information on this issue, the petitioner, through its counsel, noted that the petitioner had recently opened its second smoke shop and indicated that the petitioner planned to open five similar shops over the next two years. Counsel also referenced the petitioner's plans for the beneficiary to directly supervise each store manager and indirectly the shop employees, as well as oversee a part-time marketing employee. Counsel also noted that the petitioner anticipated hiring an office administrator and a purchasing manager. Counsel specifically noted that within the next twelve months the petitioner planned to hire at least one additional store manager, an administrative assistant, a purchasing manager, and a part-time market analyst.

The director determined that that the petitioner had not shown it had the financial capacity to operate a viable business in the United States or to support the employment of executive/managerial personnel.

On appeal, counsel refers to the petitioner's opening of a second shop as evidence that the parent company committed sufficient resources to operate the business in the United States. Counsel also refers to "concrete" evidence in the form of lease agreements, improvements on the leased properties, and purchase of substantial inventory. Counsel also notes that the petitioner has reinvested initial profits into the business. Counsel contends that, based on the evidence submitted, the petitioner will more likely than not be able to support an executive within the specified time frame.

Counsel's references and contentions are not persuasive. First, counsel refers to the opening of a second shop and provides a lease agreement for the second shop; however, the petitioner has not provided any evidence that it has progressed to the point of hiring employees. The record does not contain any documentary evidence of employees other than the beneficiary, the record does not contain any evidence of the inventory allegedly purchased, and the record does not contain evidence of the improvements to the leased properties.¹ Again, 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. at 190.

¹ The AAO acknowledges that counsel listed the costs of the newly created business, including fixtures and equipment in her response to the director's request for evidence. However, the record contains no documentation of the type of fixtures, the invoices to purchase the fixtures, or the actual results of installing the fixtures. The AAO will not accept counsel's claim regarding costs of fixtures without documentary evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Second, counsel's reference to concrete evidence is not substantiated in the record. As previously noted, the record does not contain evidence of improvements on the leased properties or evidence that the petitioner purchased any inventory. The petitioner has provided: copies of two lease agreements for two retail shops, entered into in May 2002 and in December 2002, respectively; the beneficiary's foreign bank statement summaries for 2001 and the first few months of 2002; and an August 2002 bank statement for the petitioner showing a balance of \$12,956.07. These documents do not show the size of the foreign entity's United States investment or the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States.

Moreover, the documentation submitted does not establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year of approval of the petition. While the petitioner has submitted evidence that it possesses the necessary premises to begin doing business in the United States, the record does not contain a detailed business plan in which the company's policies, strategies, and financial goals are clearly defined. Nor does the record include any evidence that the organizational hierarchy will include employees other than the beneficiary and one or two store employees. The petitioner must provide evidence that demonstrates a realistic expectation that the enterprise will expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Based on the evidence presented, the AAO cannot conclude that within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.