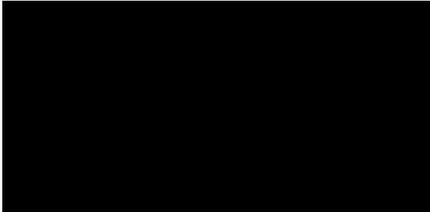


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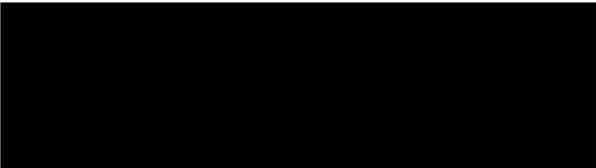
FEB 15 2005

FILE: LIN 03 039 53419 Office: NEBRASKA SERVICE CENTER Date:

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, Nebraska Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president and general manager as an L-1A 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 is a corporation organized in the State of Kansas and claims to be a subsidiary of [REDACTED] located in India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner had not established that a qualifying relationship exists between the U.S. entity and the beneficiary's foreign employer. The director also determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary would primarily perform qualifying duties.

On appeal, counsel for the petitioner disputes the director's findings and submits additional documentation to support her assertions.

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

The record reflects that in support of the petition the petitioner submitted its articles of incorporation dated November 13, 2001. This document indicated that the corporation was authorized to issue 1,000 shares of its stock.

On February 10, 2003, the director issued a request for additional evidence instructing the petitioner to submit copies of all issued shares and a copy of the stock ledger, as well as any other documentary evidence to support the claim that the U.S. entity is entirely owned by the foreign entity.

The petitioner's response included a photocopied stock certificate issuing 1,000 shares, out of a total 10,000 authorized shares, to the petitioner itself. The number of the stock certificate was illegible. Therefore, it is impossible to determine whether other stock certificate(s) may have been issued prior to this stock certificate, which is dated November 13, 2002. The petitioner also submitted a stock transfer ledger, which indicates that only one stock certificate was issued, and name [REDACTED] as the owner of that stock. The stock ledger indicated that the number of authorized and issued shares are 10,000 and 1,000, respectively. In addition, the petitioner provided a copy of its November 11, 2002 minutes of its board of director's meeting indicating that 1,000 shares were issued.

After reviewing the documentation submitted, the director denied the petition concluding that the petitioner failed to establish the existence of a qualifying relationship. Specifically, the director stated that the minutes of the petitioner's board of directors meeting indicated that the foreign entity owns 10,000 shares of the petitioner's stock. Based on a thorough review of the document in question, the AAO concludes that the director's observation was inaccurate, as the minutes of the said meeting clearly state that the foreign entity owns 1,000 of the petitioner's shares, not 10,000 as stated by the director. As such, the director's comment is hereby withdrawn.

However, the director properly pointed out the inconsistent information presented in the petitioner's stock certificate. Namely, the director focused on the fact that the petitioner is named as the owner of its own stock, and the stock certificate's indication that 10,000 shares of its stock were authorized to be issued. The director concluded that as a result of these unresolved inconsistencies Citizenship and Immigration Services (CIS) could not conclude that the petitioner had successfully established a qualifying relationship with a foreign entity.

On appeal, counsel discusses the director's observation and submits a correction to the minutes, which the director deemed inconsistent with the petitioner's claim regarding its authorized shares. However, since the AAO has withdrawn the director's erroneous statements regarding the facts put forth in the minutes of the board of directors' meeting, counsel's assertions on this point need not be further addressed. In regard to the petitioner's stock certificate, counsel refers to the above inconsistencies as "clerical errors" and asserts that regardless of such errors the petitioner's intent has always been to convey ownership of all of its shares to the foreign entity. While this may be true, the fact remains that 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). The petitioner's intent in and of itself is not evidence. As such, the director must rely on documents, like the petitioner's initial stock certificate, to determine whether the claim is corroborated by independent evidence. In the instant case, the petitioner's stock certificate fails to identify the foreign entity as the owner of the petitioner's stock and indicates that 10,000, rather than 1,000, shares of stock were authorized to be issued. While the

petitioner's stock transfer ledger does identify the foreign entity as the owner of the petitioner's stock, it also indicates that the petitioner is authorized to issue 10,000 shares, contrary to the indications in the petitioner's articles of incorporation and the subsequent minutes of the board of directors' meeting. The petitioner attempts to overcome this inconsistency by submitting a board resolution, dated August 10, 2003, in which the board resolved to nullify the first stock certificate and issue Stock Certificate No. 2 giving the foreign entity 1,000 shares of the petitioner's stock. However, a close review of Stock Certificate No. 2 indicates that it has been altered. Furthermore, the stock certificate is dated November 13, 2001, which leads the AAO to question the document's authenticity when the board resolution calling for issuance of this stock certificate was not issued until August of 2003, nearly two years after the date that appears on the stock certificate. 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). Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* As such, the significant inconsistencies discussed herein cause the AAO to question the credibility of the new information presented in the additional stock ledger, which was submitted on appeal and reflects the changes of Stock Certificate No. 2.

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 immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). In 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.

On review, the evidence of record in the instant case fails to demonstrate that a qualifying relationship exists between the U.S. petitioner and the beneficiary's foreign employer. For this initial reason, the petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established that the beneficiary would be employed 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 proposed duties in the United States:

[The beneficiary] currently serves as the President and General Manager of our US Company. In this capacity, [he] oversees and directs all executive functions of the company. Initially, [he] negotiated all purchase agreements and contracts in the acquisition of [the petitioner]'s retail outlets. In the past year, [the beneficiary] has been responsible for establishing goals and acquisition policies of our retail locations and exercises discretionary decision-making authority based upon policies and procedures developed by [redacted] India. He hires and supervises personnel and assumes sole responsibility of all discretionary actions taken by [the petitioner]. As President and General Manager, [the beneficiary] has the overall executive responsibility for developing, organizing, and establishing the purchase, sale, and retail distribution of food, automotive, and household products in the U.S. domestic market. His other duties include: (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. market; (ii) hiring appropriate personnel and leasing equipment and retail distribution facilities; (iii) negotiating and supervising the drafting of purchase agreements; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by the shareholders and directors; and (vi) developing and

implementing plans including conducting all due diligence inspections and testing to ensure [the petitioner]'s profitable operation and expansion.

The petitioner also provided the following percentage breakdown of the beneficiary's duties: 1) 35% on management decisions and team building; 2) 20% on acquisition policies and contract negotiations; 3) 10% on financial decisions; 4) 10% on supervising daily company functions; 5) 15% on applying corporate philosophies, policies, and procedures established by the foreign entity; and 6) 10% on the organizational development of the company.

After reviewing these duties, the director requested additional information in the notice dated February 10, 2003. Namely, the petitioner was instructed to provide a more detailed description of the beneficiary's current duties with a percentage of time assigned to each duty. The petitioner was also instructed to provide a copy of its organizational chart listing all of its employees and their job titles. In addition, the director asked that the petitioner indicate the hours of operation of each gas station along with each employee's work schedule.

In response, the petitioner provided the following breakdown of the beneficiary's duties:

1. Mainly, [the beneficiary] is responsible for (i) identifying, recruiting, and building a management team and staff with background and experience in the U.S. market; (ii) hiring appropriate personnel and leasing equipment and retail distribution facilities; (iii) negotiating and supervising the drafting of purchase agreements; (iv) overseeing the legal and financial due diligence process and resolving any related issues; (v) developing trade and consumer market strategies based on guidelines formulated by the shareholders and directors; and (vi) developing and implementing plans including conducting all due diligence inspections and testing to ensure [the petitioner]'s profitable operation and expansion. (Percentage of Time Spent: 35%)
2. During the Acquisition phase, [the beneficiary] negotiated all purchase agreements and contracts in acquiring retail outlets [sic]: Lo-Cost and Convenience Plus and other contracts for prospective locations. The company's goal is to become one of the leading retail operations in the country; therefore, [the beneficiary] still continues to look for new retail locations, conduct due diligence studies and make recommendations to the shareholders and owners of the Company in connection with retail acquisitions. (Percentage of Time Spent: 20%)
3. [The beneficiary] oversees all financial aspects of the Company. More specifically, [he] authorizes payments on accounts, works with local Certified Accountants in preparing tax reports, prepares daily reports, and ensures compliance with environmental, county, city and tax codes. (Percentage of Time Spent: 10%)
4. He hires and supervises personnel and assumes sole responsibility of all discretionary actions taken by [the petitioner]. [He] oversees the hiring and staffing of the retail outlets and makes discretionary decisions on promotions and employment. (Percentage of Time Spent: 10%)

5. [The beneficiary] has been responsible for establishing goals and acquisition policies of our retail locations and exercises discretionary decision-making authority based upon policies and procedures developed by [REDACTED] India. Thus, [he] provides guidance and develops company procedures and policy in the operation of the retail outlets based upon his knowledge obtained from [REDACTED] in India and based upon guidance from the shareholders of the Company. (Percentage of Time Spent: 15%)
6. As President and General Manager, [the beneficiary] has the overall executive responsibility for developing, organizing, and establishing the purchase, sale, and retail distribution of food, automotive, and household products in the U.S. domestic market. Therefore, [the beneficiary] makes decisions on the type of products to be carried and works with vendors in negotiating special pricing for product promotions. (Percentage of Time Spent: 10%)

The petitioner also submitted its organizational chart showing the beneficiary at the very top of its hierarchy and two store managers (one for each of the established convenience stores) directly under his supervision. The chart also indicates that each store location has two cashier/clerks. Based on the salaries shown in each employee's respective W-2 tax statement for the year 2002 and the petitioner's quarterly wage reports for the first quarter of 2003, it appears that two of the four store clerks are not employed on a full-time basis, as their respective salaries fall below the national minimum wage standard.

In the denial, the director summarized the information submitted by the petitioner and stated that based on the wages and description of duties of the store managers, these individuals are directly involved in the daily convenience store operations and, therefore, are not primarily performing "truly managerial tasks." However, the definitions of managerial and executive capacity contained in sections 101(a)(44)(A) and (B) of the Act apply to the beneficiary of the present petition and not to his subordinate employees. Based on the director's reasoning, no beneficiary would qualify as a manager or executive if the organization's ultimate, lower tier subordinate is not a professional or managerial employee. According to the director, each tier of management would be disqualified as the first-line supervisor of non-professional staff. However, the beneficiary may not be disqualified based on the conclusion that his subordinates do not fall under the definitions of managerial and executive capacity pursuant to sections 101(a)(44)(A) and (B) of the Act. As the director's comment is an inaccurate interpretation of the petitioner's burden, it is hereby withdrawn. Despite this deficiency, however, the AAO must, for the additional reasons stated below, dismiss the appeal.

The director ultimately concluded that the beneficiary would be involved directly in the daily operational tasks of running the two existing convenience stores and, therefore, would not primarily perform managerial or executive duties on a day-to-day basis.

On appeal, counsel asserts that the director erred in overemphasizing the size of the petitioning entity, claiming that the petitioner has submitted sufficient evidence to establish the beneficiary's qualifications for the L-1A visa category. However, the director's consideration of the size of the petitioning organization comports with current law. While size cannot be the sole consideration in determining eligibility for managerial or executive status, the director can and should consider the size of the petitioner's personnel for the purpose of establishing whether the petitioner has a sufficient staff to relieve the beneficiary from performing non-qualifying duties. In the instant case, the petitioner's business consists of two convenience

store/gas station operations each of which operates 109 hours per week. Based on these lengthy hours of operation the number of personnel available to work in the stores is highly relevant in determining whether the beneficiary is performing managerial or executive duties, as claimed, or whether he is contributing significant portions of his time to assist in the operation of the two convenience stores. While the petitioner identifies a total of three employees for each store location, the petitioner's quarterly wage report for the first quarter of 2003 indicates that the salaries of two of the store clerks (one in each location) are commensurate with those of part-time rather than full-time employees. In light of this probability, it is highly unlikely that either store has been able to maintain 109 hours of operation with only one manager per store where each manager is presumed to be working 48 hours per week. Based on the managers' work schedules each location operates without any managerial supervision at least eight hours per each day of operation and is entirely without managerial staff each Sunday. As there is no indication that any of the store clerks have supervisory or managerial training, it is unlikely that either of the stores stay open for more than 50% of their total operating hours without the beneficiary's direct involvement. In addition, the work schedules of the four store clerks indicate that each clerk works an eight-hour day Monday through Saturday and additional hours to maintain the remaining 13 hours of operation on Sunday. However, these rigorous work schedules are unsupported by the petitioner's quarterly wage reports for the fourth quarter of 2002 and the first quarter of 2003, which indicate that at least two of the four store clerks are employed on a part-time basis. As previously stated, 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. at 591-92. In the instant case, the petitioner provides no explanation to help the AAO understand how the petitioner's lengthy store hours and relatively small staff can successfully operate the two stores without requiring the beneficiary's direct involvement in the stores' daily operational tasks. It is noted that 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). Thus, while the petitioner is certainly not required to have a large staff to establish that the beneficiary primarily performs managerial and/or executive duties, it is imperative for the petitioner to show that it has enough personnel, whether directly employed by the petitioner or those contracted on a temporary basis, to relieve the beneficiary from having to perform the 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. at 604.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. 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). In the instant case, the description of the beneficiary's duties indicates that the beneficiary would perform all the marketing and contract negotiations. Neither of these duties, which would take up considerable portions of the beneficiary's time, can be deemed managerial or executive as defined by sections 101(a)(44)(A) and (B) of the Act. Thus, the record does not establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. The record indicates that a significant portion of the beneficiary's duties have been and will be directly providing the services of the business. The petitioner has not demonstrated that the beneficiary would be relieved from performing non-qualifying duties. Nor has the petitioner demonstrated that it has reached 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. 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, the 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.