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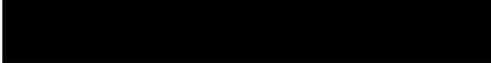
U.S. Citizenship  
and Immigration  
Services

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File: SRC 03 237 50646 Office: TEXAS SERVICE CENTER Date: **SEP 21 2005**

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)

IN 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 filed this nonimmigrant petition seeking to extend the employment of its managing director 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 Georgia corporation that claims to operate a gas station and convenience store. The petitioner claims that it is the subsidiary of M/s Syndicate [REDACTED] located in Kukatpally, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and was subsequently granted a one-year extension of stay. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the United States entity has a qualifying relationship with the foreign entity. The director observed that the petitioner operates as a franchise and found that it can not be a qualifying organization. In addition, the director found that the petitioner submitted insufficient evidence to establish that the United States and foreign entities are currently doing business.

On appeal, counsel claims that the petitioner qualifies as a subsidiary of the foreign entity based on stock ownership, and contends that the petitioner does not operate its business under a franchise agreement. Counsel submits a brief and additional evidence to establish that the petitioner and the foreign entity are doing business.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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) 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 primary issue in this matter is whether the petitioner has established that the U.S. and foreign entities are qualifying organizations as required by 8 C.F.R. § 214.2(l)(3). This issue will involve two separate discussions: 1) whether the petitioner has a qualifying relationship with the foreign entity; and (2) whether the petitioner and the foreign entity are doing business.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii) provide the following definitions for purposes of establishing a qualifying relationship:

- (H) *Doing business* means the regular, systematic, and continuous provision of goods an/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.
- (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 AAO will first consider whether the petitioner established that the U.S. and foreign entities have a qualifying relationship based on common ownership and control.

On Form I-129, the petitioner indicated that it is a subsidiary of the foreign entity, yet stated, "Both the U.S. company and the Indian company are owned and controlled by alien." In support of the initial petition submitted on August 29, 2003, the petitioner submitted evidence that it had acquired a gas station and convenience store on or about May 22, 2003, including a memorandum of sale, bill of sale, promissory note, security agreement, and transfer and assignment of lease agreement.

On November 17, 2003, the director requested additional evidence, in part instructing the petitioner to submit documentary evidence to establish the current ownership and control of the Texaco gas station, the petitioning company, and the foreign entity. The director noted that such evidence may be in the form of stock certificates, copies of corporate bylaws/constitutions that clearly indicate stock ownership, or copies of published annual reports which indicate affiliates and/or subsidiaries and the percent of ownership held by the parent corporation.

In a response dated December 30, 2003, the petitioner submitted three stock certificates for the United States company indicating that its common stock is distributed as follows: (1) the beneficiary holds 6,000 shares; (2) [REDACTED] holds 2,000 shares; and (3) [REDACTED] holds 2,000 shares. The stock certificates indicate on their face that the petitioner's stock is valued at \$1.00 per share. All three stock certificates are dated April 16, 2001. The petitioner also submitted balance sheets for September, October and November 2003 all of which indicate the value of the petitioner's common stock as \$1,000. The petitioner did not address the director's request for documentary evidence to establish the ownership of the foreign entity, nor did it comment on the ownership of the Texaco gas station.

The director denied the petition on June 14, 2004, citing the regulations at 8 C.F.R. §§ 214.2(l)(1)(ii)(G) through (L), which define qualifying organization and related terms. The director noted that the petitioner acquired a [REDACTED] and concluded: "The Service has held that franchise and license relationships do not qualify in any of the above ways. Since the petitioning company is operating as a franchise the petition cannot be approved."

On appeal, counsel asserts:

[The foreign entity] "is a qualifying organization in that it continues to operate its business, and serves as the parent in that its U.S. business is a subsidiary. The three principals of [the foreign entity] abroad own the U.S. business as indicated by the submitted stock certificates. Therefore, the parent owns more than half of the U.S. entity and controls the entity. [The foreign entity]" is the parent with its subsidiary U.S. entity.

\* \* \*

[The petitioner] does not operate its business as a franchisee of Texaco. [The petitioner] uses Texaco fuel, however it is at liberty to use any company fuel . . . . [The petitioner] has no franchise or license relationship with Texaco.

Counsel's assertions are persuasive in part. In adjudicating this petition, the director incorrectly focused on the petitioner's operation of a franchise rather than on the necessary qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner. *See* 8 C.F.R. § 214.2(l)(3)(i) (requiring that the petitioner and the organization that previously employed the beneficiary are qualifying organizations). Contrary to the director's statements, the evidence of stock ownership is not only material to the petitioner's claims, but also critical to determining whether a qualifying relationship exists. The AAO further notes that the director's conclusion that the petitioner operates a franchise was based on an assumption, rather than any evidence in the record that the petitioner signed a franchise agreement with Texaco. The director's comments with respect to the petitioner's franchise operations will be withdrawn. However, based on the evidence submitted, the director's ultimate conclusion that the United States and foreign entities do not have a qualifying relationship must be affirmed.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are "ownership" and "control." *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 immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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 corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The director in this matter found that the petitioner could not establish a qualifying relationship with the foreign entity because the petitioner operates under a franchise agreement. As noted above, the petitioner in this case has not been shown to operate a franchise. However, even if the petitioner did operate a franchise, it should be noted that by itself, the fact that a petition involves a franchise will not automatically disqualify the petitioner under section 101(a)(15)(L) of the Act. If a foreign company claims to be related to a U.S. company through common ownership and control, and that U.S. company is doing business as a franchisee, the director must examine whether the U.S. and foreign entities possess a qualifying relationship through common ownership and management under section 101(a)(15)(L) of the Act. Therefore, in the present matter, the critical relationship is that between the beneficiary's overseas employer and the U.S. petitioner. In order to determine whether a qualifying relationship exists, the AAO must examine the number of shares of stock issued by the petitioner, the ownership of that stock, and the resulting percentage ownership of the U.S. petitioner.

The petitioner and counsel assert that there is a parent-subsidiary relationship between the two companies; however, it has not established that the foreign entity owns any interest in the petitioner. Therefore, the U.S. entity is not a subsidiary of the foreign entity. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(I) and (K).

The petitioner has also claimed that (1) both companies are owned and controlled by the beneficiary; and (2) both companies are owned by the same three individuals. Either of these claims, if supported by probative evidence, would indicate an affiliate relationship pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L). However, there are several problems with the petitioner's evidence which preclude the AAO from finding a qualifying relationship between the two entities. First, the petitioner has not clarified why it initially indicated that the beneficiary owns and controls both the United States and foreign entities, and later claimed that the same three individuals own both entities. 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).

Second, although specifically requested by the director, the petitioner has submitted no evidence to establish the ownership and control of the foreign entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, 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). Therefore, the petitioner has not substantiated its claim that the two entities are owned and controlled by the same individual or group of individuals. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L).

Finally, the petitioner has not submitted credible or consistent documentation of the U.S. company's ownership and control. As noted above, the only evidence in the record consists of three stock certificates issued to the beneficiary and two other individuals in April 2001, indicating that 10,000 shares were issued, each with a par value of \$1.00. The stock certificates do not indicate on their face how many shares the petitioner is authorized to issue; this number was either not completed or was obscured when the documents were photocopied. It also appears that the name of the company issuing the stocks has been altered using

correction fluid. 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. *Matter of Ho*, 19 I&N Dec. at 591.

The petitioner's 2003 IRS Form 1120, U.S. Corporation Income Tax Return, submitted on appeal, further undermines the probative value of the petitioner's stock certificates. The Form 1120 indicates that the company was incorporated on June 1, 2003, and that the 2003 tax return is its initial return. The submitted tax return also indicates that the total value of the petitioner's common stock is \$1,000, and that all stock was issued during the 2003 tax year. This information conflicts with other evidence in the record indicating that the company was incorporated in 2001 and has issued common stock valued at \$10,000. Again, the petitioner is obligated 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). The petitioner has not submitted credible evidence to establish its ownership at the time the petition was filed. As the petitioner has failed to provide evidence of common ownership and control between the United States and foreign entities, it has not established that the companies have an affiliate relationship.

The AAO will next turn to the issue of whether the petitioner established that it is a qualifying organization doing business in the United States and abroad as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H).

With the initial petition, the petitioner submitted: (1) evidence that it purchased a gas station and convenience store and assumed the former owner's lease as of June 2003; (2) an income statement for the month of July 2003, which reflects that the petitioner did not have sales prior to that month; (3) projected income statements for the year ending December 31, 2003; (4) the petitioner's bank statement for July 2003; (5) a Georgia Form ST-3 Sales and Use Tax form for July 2003; and (6) tax, registration and license certificates for the petitioner's gas station and convenience store, all of which were issued in June 2003. The petitioner indicated on Form I-129 that its gross annual income is \$370,000, and submitted a projected income statement for 2003 estimating total sales of approximately \$182,000. With respect to the foreign entity, the petitioner stated that the Indian company "continues to support investment efforts in the United States."

On November 17, 2003, the director requested evidence to establish that the petitioner and foreign entity are currently engaged in business operations, including current financial records such as tax returns, annual reports, profit and loss statements, accountant reports, banking records, employee rosters, and evidence of business conducted, such as invoices, bills of sale, and product brochures of goods sold or produced by the company.

In response, the petitioner submitted the U.S. company's income statements and bank statements for September, October and November 2003. The petitioner did not submit any documentation to establish that the foreign entity continues to do business in India. The director concluded that there is "[n]o current evidence that the entity is doing business in the U.S. or abroad."

On appeal, counsel for the petitioner submits: (1) the U.S. entity's licenses and certificates for 2004; (2) the U.S. entity's bank statements for a three-month period in 2004; (3) the U.S. entity's 2003 IRS Form 1120,

U.S. Corporation Income Tax Return; (4) a "summary letter" from the foreign entity's accountant; (5) the foreign entity's bank statements for a three-month period in 2004; (6) the foreign entity's certificate of registration for 2004; and (7) the foreign entity's income tax statements for 2003 and 2004.

Upon review, the petitioner has not established that the United States and foreign entities have been or would be doing business in a regular, systematic and continuous manner.

With respect to the foreign entity, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now attempts to submit evidence that the foreign entity is doing business on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Accordingly, the petitioner has not overcome the director's findings on this issue.

With respect to the U.S. entity, the petitioner has not provided evidence that the U.S. entity was doing business prior to July 1, 2003. Although the beneficiary had been in the United States in L-1A status for approximately two years at the time the instant petition was filed, it is not clear from the record how or if the petitioner was doing business prior to purchasing a gas station and convenience store two to three months prior to the filing of the instant petition. In addition, the Form 1120, U.S. Corporation Income Tax Return submitted on appeal indicates that the petitioner did not file tax returns prior to 2003, which further supports a conclusion that the U.S. entity has not been doing business continuously since the beneficiary's transfer to the United States. The evidence submitted on appeal relates to the petitioner's business activities in 2004 and is not relevant to the adjudication of the instant petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The petitioner has not established that it was engaged in the regular, systematic, and continuous provision of goods and/or services at the time the instant petition was filed. *See* 8 C.F.R. § 214.2(l)(ii)(H).

Based on the foregoing discussion, the petitioner has not established that the U.S. entity and foreign entity are qualifying organizations. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary has been or would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. The petitioner initially described the beneficiary's duties in only vague and general terms, indicating that he was "responsible for the direction and coordination of activities, planning, formulating and implementing administrative and operational policies and procedures." In response to the director's request for a definitive statement regarding the beneficiary's duties, the petitioner provided an equally ambiguous job description, indicating that the beneficiary will "manage the company's overall financial administration, oversee the financial reports, formulate company policies, and executive expansion efforts" and that he "supervises and coordinates the daily activities of the business, which includes all banking, sales, and contractual transactions." 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). The vague job description provided by the petitioner does not allow the AAO to determine what duties the beneficiary performs, such that they could be classified as managerial or executive.

Furthermore, the AAO notes that the petitioner operates a gas station and convenience store, a type of retail business which is typically open daily and requires long operating hours. The AAO will assume that the business is open at least twelve hours daily or a minimum of 84 hours per week. In addition to the beneficiary, the petitioner employed a single sales clerk to perform all of the day-to-day functions of ordering merchandise and supplies, arranging and stocking merchandise displays, cleaning the store and restrooms, processing customer purchases of groceries and gasoline, receiving deliveries, reconciling daily cash register receipts and many other routine duties. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Based on the petitioner's representations, it is evident that the reasonable needs of the petitioning company could not plausibly be met by the services of the beneficiary as managing director and one sales clerk. Given the absence of employees who would perform the non-managerial or non-executive operations of the company, it is reasonable to conclude that the beneficiary would need to spend a significant portion of his time directly providing the services of the company in order for the business to remain open during the many operating hours during which his one subordinate was not at work. The petitioner has not established that the routine duties associated with running the petitioner's store would not occupy the majority of the beneficiary's time. 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 (Comm. 1988). For this additional reason the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In sum, the petitioner has failed to establish that (1) the United States entity and the foreign entity are qualifying organizations, in that the two companies have a qualifying relationship and are engaged in the regular, systematic and continuous provision of goods and/or services; or (2) the beneficiary would be employed by the United States entity in a managerial or executive capacity.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.