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U.S. Citizenship  
and Immigration  
Services

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*Handwritten initials "DH"*

File: WAC 04 041 53145 Office: CALIFORNIA SERVICE CENTER Date: **SEP 30 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**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 filed this nonimmigrant petition seeking to extend the employment of its president 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).<sup>1</sup> The petitioner is a corporation organized in the State of California that claims to be engaged in the trade of leather products, garments, and novelties. The petitioner claims that it is the affiliate of [REDACTED] located in Karachi, Pakistan. The beneficiary was initially granted a one-year period of stay to open a new office, and the petitioner now seeks to extend the beneficiary's stay for two more years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner requests reconsideration of the beneficiary's qualifications and submits a brief and additional evidence.

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.

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<sup>1</sup> It is noted that an unaccredited representative described as "Complete Business Solutions" prepared the petition. Furthermore, the initial petition was not accompanied by a Form G-28, Notice of Entry of Appearance by an Attorney or Representative. As a result, the petitioner failed to establish that its initial representative was a licensed attorney or an accredited representative authorized to undertake representations on the petitioner's behalf. See 8 C.F.R. § 292.1. Although the petitioner has since retained a licensed attorney to represent the petitioner, it should be noted that assertions by unaccredited representatives are not considered.

- (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, 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 the initial petition, the petitioner, in a letter dated November 20, 2003, stated that the beneficiary is currently acting as the president of the U.S. entity and that his duties are as follows:

[The beneficiary] is currently the President at [the petitioner]. He has served at this capacity since January 15, 2003 under his valid L-1A status. As the President of the corporation is the overall in charge [sic] of the business development, [i]nternational operations and marketing division of the organization. He has the ultimate authority to hire and fire the staff, appraise the performance of staff for their increments and promotions, take on lease, buy or otherwise acquire business space and other infrastructure, negotiate and sign contracts for buying and selling company's raw and finished products, and arrange finances, decide the structure of prices charged and other important matters. He is also responsible for filing tax returns and dealing with government [i]nstitutions.

The petitioner also submitted its Employer's Quarterly Tax Returns for the quarters ending June 30, 2003 and September 30, 2003, as well as a payroll listing for the month of October 2003. Although the beneficiary was the only employee listed on the June 30, 2003 return, the September and October documents indicated that the petitioner employed a total of four employees, including the beneficiary.

The director was not satisfied with the initial evidence submitted and issued a request for additional evidence on January 22, 2004. The director requested an explanation as to how the beneficiary would be primarily engaged in managerial and/or executive duties and specifically requested an organizational chart showing the beneficiary's place in the petitioner's organizational hierarchy. Furthermore, the director asked the petitioner to confirm whether it employed any other persons and, if so, requested

information with regard to their duties and their educational backgrounds. Finally, the director requested copies of the petitioner's Form DE-6, Employer's State Quarterly Tax Return, for the past three quarters as well as copies of the petitioner's Form 941, Employer's Federal Quarterly Tax Return, for the same period.

In a response dated March 23, 2004, the petitioner confirmed that at the current time, the beneficiary oversaw four employees: a store manager, a sales and purchasing coordinator, an accountant, and a part-time customer service representative. With regard to the beneficiary's duties, the petitioner provided the following list:

- Products Procurement
- Account Management
- Spear head all sales initiatives
- Organize Funding Programs
- Marketing Plan Development
- Maintaining loyal customer base
- Brand Marketing
- Client Relations Communications

A further description of the beneficiary's tasks was also provided:

1. Plan, develop and establish policies and objectives of the company
2. To confer with customers regarding products sought by them and negotiate with vendors to procure products at the best possible price.
3. To keep accounts, file monthly, quarterly and annual tax returns and deal with concerned Government departments.
4. To carry out financial programs that provide funding for new or continuing operations to maximize return on investments.
5. Hire suitable and experienced employees.
6. Co-ordinate the functions between staff members to establish responsibilities and attain optimum benefits from available resources.
7. Be close to the fashion conscious consumer to get first hand feedback, understanding new style of products.
8. Lead expansion of the company.

Finally, the petitioner provided the following breakdown of the percentage of time the beneficiary devoted to each duty:

1. Plan/develop policies = 5%
2. Procure products = 20%
3. Manage Accounts = 20%
4. Organize funding programs = 10%
5. Employ personnel = 10%
6. Coordinate staff = 20%

7. Develop Marketing Plan = 15%

On April 13, 2004, the director denied the petition. The director concluded that the petitioner had failed to establish that the beneficiary would continue to be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner had failed to establish that the beneficiary would not engage in the day-to-day operations of the business. In addition, the director noted that a preponderance of the beneficiary's duties consist of directly providing the services of the business. Finally, the director found that the petitioner had not established that the beneficiary would be supervising a subordinate staff of managerial, supervisory, or professional employees who could relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner provides additional new information with regard to the beneficiary's duties. Specifically, counsel provides a more detailed description of the beneficiary's duties not previously provided and urges reconsideration of the beneficiary's qualifications based on this new set of facts. Upon review, the AAO concurs with the director's findings.

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 this case, the petitioner provided a vague and generalized description of the beneficiary's duties and concludes that the beneficiary is thus a manager and/or an executive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.). 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.*, 724 F. Supp. at 1108. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Although the petitioner provided additional details about the beneficiary's duties in response to the request for evidence, the petitioner has still failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.*

The AAO notes that despite the director's specific request for an explanation as to how the beneficiary would refrain from performing the routine day-to-day duties of the business, the petitioner failed to provide such an explanation. The petitioner merely paraphrases the definitions of "managerial capacity" and "executive capacity" in its response to the request for evidence and thereby concludes that the beneficiary is functioning in a qualifying capacity. Based on this limited recitation of duties, the director found that the petitioner had not met its burden of proof in this matter.

On appeal, however, the petitioner's newly retained counsel submits a thorough and much more detailed description of the beneficiary's duties. This newly-submitted description, however, will not be considered. The petitioner was put on notice of required evidence regarding the beneficiary's duties and was given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. However, the petitioner provided only a limited description in response to the request for evidence, which

was insufficient to establish eligibility in this matter. Although counsel now submits many more details on appeal, 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). The appeal will be adjudicated based on the record of proceeding before the director.

According to the record of proceeding prior to adjudication, the beneficiary oversaw four other employees: a store manager, a sales and purchase coordinator, an accountant, and a part-time sales person. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act.

Though the petitioner provided the educational levels attained by the subordinate employees, it is unclear whether a bachelor's degree is actually required to perform the duties of these employees. Although it appears that these employees possess at minimum a bachelor's degree, it is unclear whether such a degree is a prerequisite to performing the duties of their positions, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Furthermore, it appears from the description of duties contained in the record that the beneficiary is performing many of the services essential to the operation of the business. 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). For example, the petitioner states that the beneficiary is responsible for keeping the petitioner's accounts and filing all of the petitioner's tax returns. The organizational chart, however, indicates that the petitioner employs an accountant whose duties are said to include "tax returns." 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). It appears, therefore, that many of the beneficiary's stated duties are non-qualifying duties, and appear to overlap with the duties of his alleged subordinates. Since the petitioner has failed to clearly establish that the beneficiary will be relieved from engaging in day-to-day, non-qualifying tasks, the AAO cannot conclude that he will be employed in a primarily managerial or executive capacity.

The petitioner has provided a vague description of the beneficiary's duties and has failed to establish that the beneficiary will be relieved from performing day-to-day essential tasks. The petitioner, therefore, has failed to establish that the beneficiary has been and will continue to be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the U.S. and foreign entities are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the statute requires that the beneficiary come to the United States to "render services to the same employer or to a

subsidiary or affiliate thereof in a capacity that is managerial or executive." Section 203(b)(1)(C) of the Act. Critical to its claimed eligibility, the petitioner asserts that the U.S. corporation is an affiliate of Alliance Leather Pvt. Ltd., based on the similar ownership interests of four individuals out of the two distinct groups of owners.

The critical regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L) states 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.

According to the evidence submitted, the U.S. and foreign entities were not owned in the majority by any one person and were not owned in their entirety by the exact same persons. In particular, [REDACTED] owned four shares of the foreign entity but none of the U.S. entity, while [REDACTED] owned 4,000 shares of the U.S. entity but none of the foreign entity. Therefore, the petitioner and the Pakistani company were not owned and controlled by the "same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity," per the definition at 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

In applying part 2 of the definition of affiliate to nonimmigrant petitions, the AAO has historically required that the *same* group of individuals own and control approximately the same share or proportion of each entity. 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). As clearly indicated in the regulation, while it is not required that each individual own the exact same percentage of each entity, it is required that the group of individuals who own each entity, albeit directly or indirectly, be the same. *Id.*; see also 8 C.F.R. § 214.2(l)(1)(ii)(K) (defining "subsidiary"). It is important the same group of individuals own and control both entities to ensure that both entities are part of the same organization as intended by Congress. Otherwise, CIS faces a situation in which diversely-held business associations would meet the requirements of a qualifying affiliate relationship, through means "such as ownership of a small amount of stock in another company without control, exchange of products or services, and membership of the directors of one company on another company's board of directors." 52 Fed. Reg. 5738, 5742 (Feb. 26, 1987).

When the definition of affiliate was added to the Code of Federal Regulations in 1987 it read, "[a]ffiliate' means one of two subsidiaries both of which are owned and controlled by the same parent or individual or 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." 52 Fed. Reg. at 5752. Absent majority and thus "de jure" control of the U.S. and foreign entities by a single person, ownership of both entities by the same group of individuals without any "de jure" or "de facto" majority control was already considered by CIS to be a lenient standard. See Memorandum, Richard E. Norton, Assoc. Commissioner,

Immigration and Naturalization Service (INS), *Implementation of Final L Regulations*, 1 (Aug. 20, 1987) (copy on file with the AAO). This less stringent standard was permitted, however, in an apparent attempt to balance business realities with ensuring the intent of Congress as well as the integrity of the multinational executive and managerial immigration provisions. See 56 Fed. Reg. 61111, 61114 (Dec. 2, 1991).

With regard to Congressional intent, several years after the final implementation of the regulatory definition of affiliate, Congress reviewed this definition as it pertained to intra-company transferees (L-1 nonimmigrants) and added "certain international accounting firms" to the definition through the Immigration Act of 1990. Pub. L. No. 101-649, § 206, 104 Stat. 4978 (1990). Congress did not provide a new statutory definition of affiliate or make any other changes to the INS-created definition.

Based on this limited expansion of the definition of affiliate to include franchised accounting firms, INS confined its regulatory changes to add only this clarification. 56 Fed. Reg. 61114. The INS did not further expand the definition of affiliate beyond this clarification based on the reasoning that, "if Congress wanted to expand the Service's definition of 'affiliate,' it could have done so in the statute. Since the definition was not altered by Congress, the Service believes that the current definition comports with Congressional intent." *Id.* It is presumed that Congress is aware of CIS regulations at the time it passes a law. See *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

Therefore, the petitioner's assertion that the definition of affiliate includes entities owned and controlled by a majority of the same group of individuals, without any majority ownership and control by a single individual, is unfounded and is neither supported by the plain meaning of the definition of affiliate in the regulations or its legal history. For this reason, the petitioner has failed to meet its burden of proof in establishing that a qualifying relationship existed between the U.S. and foreign entities at the time the petition was filed.

Moreover, as recognized in *Matter of Hughes*, where each of the individuals own a small amount of stock in the two companies without individually controlling the companies, the individuals control only if their shares are legally consolidated by a proxy agreement that guarantees that one individual will vote the shares in concert. 18 I&N Dec. 289, 293 (Comm. 1982) (discussing proxy votes). In this matter, four individuals owning approximately 82% of the United States company may or may not vote in concert to retain "de jure" or 51% control. Likewise, these same individuals may or may not vote in concert to retain "de jure" control of the foreign entity. Even if the petitioner were to argue that the four individuals would vote in concert due to some familial relationship, the regulations do not recognize a familial relationship as the basis for a qualifying relationship or as a means of legally consolidating the shares of individual owners. Thus, the companies are not affiliates as the petitioner has not established that the same individuals control both companies.

Accordingly, the petitioner has not established in these proceedings that a qualifying relationship exists between the petitioner and the foreign entity, as required by 8 C.F.R. § 214.2(l)(1)(ii)(A) and (3)(i). For this reason, the petition must be denied.

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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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.