

**Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**



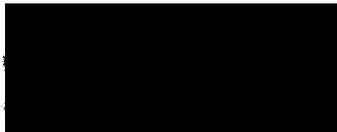
D7

FILE: EAC 03 191 50261 Office: VERMONT SERVICE CENTER Date: SEP 30 2005

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, Vermont 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, a corporation organized in the State of Delaware on April 14, 2003, claims that it is a new office engaging in the freight forwarding business. It seeks to employ the beneficiary temporarily in the United States as its manager-business operations, 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 Cargomar Pvt., Ltd., located in Tamilnadu, India.

The director denied the petition concluding that the petitioner has failed to establish that: 1) there exists a qualifying relationship between the U.S. and foreign entities; 2) within one year, the U.S. entity will be of sufficient size to support a managerial or executive position; or (3) sufficient premises to house the new office have been secured.

Counsel for the petitioner subsequently filed a motion to reconsider and an appeal on Form I-290B. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel asserts that all of the shares of the petitioner are in fact owned by the foreign entity. Counsel further explains that at the time the petition was filed, the petitioner did not have time to procure office space and arrange for the necessary fund transfers to commence U.S. operations. Counsel claims that the company has since taken measures to remedy these deficiencies, and counsel submits evidence in support of this claim. Counsel also contends that the director's conclusion that the beneficiary's role is not managerial is made in error.

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) states in part 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), 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; and
- (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:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) 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
  - (3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the beneficiary's foreign employer and the U.S. organization.

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.

On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner indicated that the U.S. entity is 100% owned by the foreign entity. The petitioner submitted a copy of the U.S. entity's certificate of incorporation, dated April 14, 2003, which indicates that the total number of authorized capital stock of the company is 1,500 shares of no par value. The petitioner did not submit any documentation relating to the stock ownership and managerial control of the U.S. entity.

On August 3, 2003, the director issued a request for further evidence. Among other things, the director requested documentary evidence of the ownership and control of the foreign and U.S. entities, including, but not limited to, copies of stock certificates, stock ledgers, articles of incorporation, and joint venture agreements.

In response, the petitioner submitted a copy of the U.S. entity's share certificate number 1, dated April 14, 2003, which shows that the foreign entity is the owner of 1,500 shares of the company. The petitioner also submitted a copy of the foreign entity's company resolution, dated April 4, 2003, authorizing the chairman of the foreign entity to execute all of the documents necessary to incorporate the U.S. entity and to have all of the authorized shares of the U.S. entity be issued to the foreign entity.

In her November 10, 2003 decision denying the petition, the director observed that while the petitioner submitted a stock certificate showing that the foreign entity owns 1,500 shares of the U.S. entity, there is no indication in the record as to whether that certificate represents all or a portion of the total shares of the company. Therefore, the director concluded that the record is insufficient to show that there is a qualifying relationship between the two entities.

On appeal, counsel asserts that all of the shares of the petitioner are in fact owned by the foreign entity. Counsel submits a letter from the petitioner dated December 10, 2003, in which the petitioner pointed out that in addition to the stock certificate, it had submitted a company resolution from the foreign entity as well as the certificate of incorporation of the U.S. entity authorizing a total of 1,500 shares of no par value. The petitioner resubmitted copies of those documents.

In reviewing the record, the AAO finds that the evidence is insufficient to support the petitioner's claim that it is the wholly owned subsidiary of the foreign entity. The AAO acknowledges that the record contains (1) the April 4, 2003 board resolution of the foreign entity memorializing the foreign entity's intent to create the U.S. entity as a wholly-owned subsidiary, (2) the certificate of incorporation of the U.S. entity showing that the total authorized stock of the U.S. entity is 1,500 shares of no par value, and (3) the company's share certificate number 1, showing that 1,500 shares were issued to the foreign entity on April 13, 2003.<sup>1</sup> However, the petitioner has submitted no evidence of payment made by the foreign entity in consideration for the shares of the U.S. entity it received. The record also does not contain any board resolution of the U.S. entity authorizing the issuance of such shares, or the stock ledger of the company, such that it could be ascertained that those shares were duly issued to the foreign entity, and that the share structure of the U.S. entity has not changed and no other shares were issued between April 13, 2003 and the filing of the petition in June 2003. In light of the foregoing, the AAO agrees with the director's determination that the evidence of record is insufficient to establish that, at the time of the filing of the petition, the foreign entity owned all of the issued and outstanding shares of the U.S. entity and a qualifying relationship existed between the U.S. and foreign entities.

The second issue in this proceeding is whether the U.S. entity would support a primarily managerial or executive position within one year of approval of the petition.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) requires that a petition for a beneficiary who is coming to the United States as a manager or executive to open or be employed in a new office in the United States include evidence that:

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:

- (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

---

<sup>1</sup> In light of items (2) and (3), the AAO notes that the director's statement in her decision that "there is no indication in either the original submission or the response as to whether the one certificate submitted is all inclusive or a fraction of the total shares" is incorrect and therefore will be withdrawn.

- (2) 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
- (3) The organizational structure of the foreign entity.

Additionally, 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

On the L Supplement to Form I-129, the petitioner provided the following description for the beneficiary's job in the United States: "set up office, establish business, solicit business, negotiate contracts, supervise business operations, marketing activities[,] define market potential and articulate market oriented strategies to the management, promotion of sales, etc." The petitioner did not submit with the initial petition any of the evidence required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) to show that within one year of the approval of the petition, the U.S. entity will support an executive or managerial position.

In the August 8, 2003 request for further evidence, the director also requested the following: (1) evidence that establishes 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; (2) a copy of the petitioner's business plan for commencing the U.S. entity, with a specific time table for each proposed action for one year following the date the company came into existence; (3) evidence to show how the U.S. entity will grow to be of sufficient size to support a managerial or executive position, *i.e.*, to demonstrate that the beneficiary, within one year of operation, will be relieved from performing the non-managerial, day to day operations involved in producing a product or providing a service; and (4) evidence to establish that the beneficiary will be employed in an executive or managerial capacity in the U.S. entity.

In response, the petitioner submitted a statement with the following description of what is "expected" from the beneficiary in his position with the U.S. entity:

- a) [S]et up the USA operations and mould the same within a period of one year.
- b) Train a local (American) on Indian exposure and make him an Indian specialist on freight.
- c) He will travel extensively into USA (from the 3<sup>rd</sup> month) so as to familiarizes [sic] with the American system and also appoint custom brokers at different ports. He will also brief these custom brokers about India, its ports and operations. He will also brief them about cargomar group [sic] and her activities.
- d) He will meet consignees detailing them about the Indian operations and understand the problems faced by them and find out solutions [sic]. He will also increase ; thus [sic] sales and business volumes.
- e) Haulage and transportation is an important factor in addition to consolidation and groupage [sic] of cargoes. This will be studied in length [sic] by [the beneficiary] and faster and easy transport solutions has [sic] to be found in order to compete in this market.
- f) [H]e will represent cargomar in the trade and association and will be able to help the trade in Americas to understand India further due to his experience and exposure in India.

When he returns back to India he will be the man for the USA operations and will control the trade of [C]argomar to that part of the world.

In the same statement, the petitioner indicated that the foreign entity would invest in the U.S. entity as follows: (1) U.S.\$50,000 initial investment in October 2003; (2) U.S.\$50,000 for setting up in November 2003; and (3) U.S.\$105,000 for running the office in three monthly installments of US\$35,000 per month in December 2003 and January and February 2004. In addition, the petitioner set forth the following as the company's goals for the first twelve months of operation:

- a) [F]irst two months of operations – setting up structure and appointing warehouse agents, custom brokers, transporter at New York.
- b) 3<sup>rd</sup> to 5<sup>th</sup> month: travel to all other ports in USA and appoint custom broker and coordinate with them
- c) 6 to 9<sup>th</sup> month: increase sales for break even and move ahead.
- d) 10<sup>th</sup> to 12<sup>th</sup> month: first stage of implementation and report to board.

In denying the petition, the director observed that the petition contains vague generalizations as to the beneficiary's duties. The director also noted that since the petitioner apparently plans to hire only one additional employee, it is not clear whether the beneficiary himself will have to perform non-qualifying tasks of the company. Moreover, since the petitioner failed to fully define the role of the "Indian specialist," it cannot be determined whether the beneficiary would be supervising a professional. The director therefore determined that the record does not demonstrate that the beneficiary would be performing primarily managerial or executive duties and, consequently, the petitioner has not established that the U.S. entity would support an executive or managerial position within a year's time, as required by the regulations.

On appeal, counsel contends that "the conclusion that the beneficiary's role is not managerial is made in error," but does not address the director's reasoning leading to that conclusion. Counsel asserts that the company clearly has the ability to pay its managerial employees, in light of the funds from the foreign entity's freight forwarding activities in the United States, which is expected to be diverted to the U.S. entity. Counsel further refers to the petitioner's December 10, 2003 letter, in which the petitioner indicated that it has hired an assistant manager to work from the New York office and anticipates adding six persons within 12 months.

Counsel's assertions on this issue are not persuasive. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly 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.

In this instance, the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying functions within the requisite one year of approval of the petition. The director requested further evidence to show how the U.S. entity will grow to be of sufficient size to support a managerial or executive position. However, the petitioner has failed to provide any documentation that is responsive to that particular request. The petitioner provided organizational charts for the foreign entity and its other affiliates, but did not provide a chart for the U.S. entity, or any other projection of staffing for the U.S. entity. In its response to the director's request for further evidence, the petitioner outlined in brief its goals for the first 12 months of operation, but those goals do not appear to include any plan to staff the U.S. organization. As the director observed, the petitioner did indicate that the beneficiary is expected to train an "Indian specialist on freight." However, the record does not indicate when that employee is expected to be hired, nor is there any description of his or her duties, or any explanation of how he or she would relieve the beneficiary of his non-

qualifying duties. As such, the AAO finds that the record does not support the conclusion that the structure of the U.S. entity, within one year of the approval of the petition, would support a position in which the beneficiary would function in a *primarily* managerial or executive capacity.

The AAO notes that in its December 10, 2003 letter submitted on appeal, the petitioner stated that it has hired an assistant manager for the New York office and was expecting to hire six more employees within twelve months. However, the petitioner did not disclose any plan to hire an assistant manager or any other employee in the record that was before the director. Where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, as was the case here, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted that information to be considered, it should have disclosed the information in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Moreover, 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).

Based on the foregoing, the AAO concurs with the director's conclusion that the record is insufficient to establish that the intended United States operation, within one year of the approval of the petition, would support an executive or managerial position occupied by the beneficiary, in accordance with the regulations at 8 C.F.R. § 214.2(l)(3)(v)(C).

The final issue in this matter is whether the petitioner has established that sufficient physical premises to house the new office had been secured at the time the petition was filed, as required by the regulation at 8 C.F.R. § 214.2(l)(3)(v)(A).

At the time the petitioner submitted the Form I-129, the petitioner failed to submit any evidence that it had secured sufficient premises to house the new office. In fact, the petitioner's address on Form I-129 was listed as "care of" the petitioner's counsel and the address where the beneficiary will work in Part 5 of the petition was also listed as being the same as counsel's address in Part 1. In the director's August 3, 2003 request for further evidence, the petitioner was asked to provide evidence demonstrating that it has acquired leased premises of sufficient size to conduct international trade, including lease agreements identifying the square footage of the premises and the phone number of the lessor and photographs showing the interior and exterior of the premises.

The petitioner did not provide any of the requested evidence as described above. Instead, in its response to the director's request, the petitioner merely stated that its office, approximately 1000 square feet in size, will be situated in New Jersey. The petitioner indicated that arrangements will be confirmed by one of the directors of the foreign entity during his anticipated visit to the United States in October 2003. The petitioner also stated that arrangements for a warehouse in either New York or New Jersey would be made at that time.

The director determined that as the petitioner failed to provide any of the evidence requested on that issue, the petitioner has not established that sufficient physical premises to house the new office had been secured at the time the petition was filed.

On appeal, the petitioner and counsel assert that at the time the petition was filed, the petitioner did not have sufficient time to procure office space but had since secured office space in Valley Stream, New York. The petitioner submits a lease dated November 6, 2003 for the premises in question.

Counsel's and the petitioner's assertions are not persuasive in this instance. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) explicitly states that at the time of the filing of the petition, the petitioner must present evidence that sufficient physical premises to house the new office *have been* secured (emphasis added). Since the petitioner was unable to present such evidence because premises in fact were not yet secured at that time, the petitioner has failed to meet that regulatory requirement. 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)). The submission on appeal by the petitioner of a lease dated nearly five months after the petition does not satisfy the regulatory requirement. Again, 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. at 248. Moreover, as the director noted, 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). Accordingly, the AAO concurs with the director's conclusion that the petitioner has failed to establish that sufficient physical premises to house the new office had been secured at the time the petition was filed.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.<sup>2</sup> 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.

---

<sup>2</sup> 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).