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D-7

File: SRC 04 079 50982 Office: TEXAS SERVICE CENTER Date: **AUG 04 2006**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

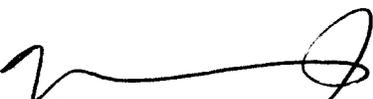
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief  
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 vice 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). The petitioner is a Texas corporation that claims to be engaged in retail sales. It operates a gas station and convenience store. The petitioner claims that it is an affiliate of M/S Bhanu Sagar Canteen and Good Luck Dairy Farm, located in India. The beneficiary was initially granted a one-year period of stay in L-1A status to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner did not establish: (2) that the U.S. entity was doing business for the entire previous year; or (2) that the United States and foreign entities are qualifying organizations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the U.S. company was doing business at the time the petition was filed and has continued to do business since December 2003. Counsel further asserts that the petitioner and the foreign entity are affiliates based on common ownership and control by the same individual, noting that the restrictions imposed on the U.S. company by its lease agreement should not affect this qualifying relationship. Counsel submits a brief in support of the appeal.

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 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.

The first issue in this proceeding is whether the petitioner established that it has been doing business for the year preceding the filing of the instant petition as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The term "doing business" means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office. 8 C.F.R. § 214.2(l)(1)(ii)(H).

The nonimmigrant petition was filed on January 22, 2004. The beneficiary's "new office" petition was previously granted for a one-year period commencing on January 24, 2003. In support of the initial petition, the petitioner submitted a lease agreement for a gas station and convenience store with a term commencing on December 4, 2003 and invoices and purchase orders documenting the petitioner's operation of the business during the month of December 2003. The petitioner also submitted its IRS Forms 941, Employer's Quarterly Federal Tax Return, and Texas Employer's Quarterly Report for the last three quarters of 2003. These documents confirmed that the petitioner first paid wages to employees, other than the beneficiary, in December 2003. Finally, the petitioner submitted its month-end and year-end financial statement as of December 2003. The statement shows that the petitioner's revenue for the 2003 year was \$85,741.63, all of which was earned during the month of December 2003.

On April 12, 2004, the director issued a request for additional evidence, in part requesting that the petitioner submit evidence of the business conducted by the U.S. company, including receipts or other evidence that the

U.S. entity has been engaged in retail services. The director specifically stated that the evidence must be dated from March 2003 to November 2003.

In a response dated May 5, 2004, counsel for the petitioner stated that the petitioner "began its business operations in December 2003." The petitioner submitted its 2003 IRS Form 1120, U.S. Corporation Income Tax Return, and extensive documentary evidence establishing that the company had been doing business since December 2003.

The director denied the petition on November 9, 2004, concluding that the petitioner had not been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The director noted that the petitioner commenced business operations only one month prior to the expiration of the beneficiary's new office petition and therefore had not met the requirements for a new office extension.

The petitioner filed the instant appeal on December 10, 2004. On appeal, counsel for the petitioner asserts that the petitioner commenced its business operations in December 2003 and "from that commencement date to today has continued operating its business without any interruption." Counsel emphasizes that the petitioner was clearly doing business as of the date the petition was filed, and had been conducting business regularly, systematically and continuously since December 2003.

Upon review, the petitioner has not established that it has been doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Contrary to counsel's assertions on appeal, the petitioner is not required to merely demonstrate that it is doing business at the time of the request for an extension of the beneficiary's initial "new office" petition. The regulations specifically require the petitioner to establish that it has been doing business throughout the previous year.

When a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its initial new office petition. It is unclear what the petitioner and beneficiary were doing in the United States between the approval of the previous petition in January 2003 and December 2003, when the petitioner began operating the gas station and convenience store, as the petitioner has not provided an explanation for this lengthy delay in commencing its operations.

The petitioner has not submitted evidence on appeal to overcome the director's decision on this issue. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has established that the petitioner maintains a qualifying relationship with a foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

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.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(J) *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.

(K) *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 Form I-129, the petitioner indicated that it is an affiliate of M/S Bhanu Sagar Canteen and Good Luck Dairy Farm, both located in India. In an attachment to Form I-129, the petitioner explained that both of these businesses are sole proprietorships owned by [REDACTED]. The petitioner stated that the same individual owns 100 percent of the stock of the U.S. company.

In support of the petition, the petitioner provided evidence that the two overseas businesses are both owned by [REDACTED]. With respect to the ownership of the U.S. company, the petitioner submitted its certificate of incorporation, articles of incorporation, bylaws, minutes of the organizational meeting of the board of directors dated September 24, 2002, and minutes of an annual shareholders meeting, dated September 24, 2002. The evidence submitted identified [REDACTED] as the owner of the company's 1,000 authorized shares and indicated that he had paid \$1,000 for these shares.

The petitioner also submitted a copy of its "lease and commission agreement" with Sattar Investments Inc. indicating that the leased premises must be operated as a gas station and convenience store, and placing certain restrictions regarding the business's hours of operation and use of the property. The petitioner submitted a tax permit showing that the U.S. company operates a Chevron Food Mart.

On April 12, 2004, the director requested a copy of the "Chevron Franchise agreement." In a response dated May 5, 2004, counsel for the petitioner stated that the petitioner does not have a franchise agreement with Chevron. The petitioner re-submitted a copy of its lease agreement with Sattar Investments, Inc. The petitioner's response to the request for evidence also included a copy of the U.S. company's 2003 IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner indicated at Schedule K, line 5 that the beneficiary owns 55 percent of the petitioner's stock.

The director denied the petition on November 9, 2004, concluding that the U.S. entity and the foreign entity are no longer qualifying organizations as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The director noted certain restrictions and requirements imposed by the petitioner's lease agreement and determined: "It appears the Lessor, Sattar Investments, controls the petitioner d.b.a. Chevron Food Mart."

On appeal, counsel for the petitioner asserts that the petitioner and the foreign entity are owned by the same individual and therefore qualify as affiliates and qualifying organizations for the purposes of this visa classification. Counsel contends "nothing in the regulations states that a Petitioner cannot execute a Lease for a retail store that requires the Petitioner to remain open for certain hours per day or that prohibits the sale of items not related to a convenience store or gas station." Counsel asserts that the restrictions imposed are not "a legal or valid reason" for the director to conclude that the petitioner does not have a qualifying affiliate relationship with its claimed affiliate in India. Counsel refers to *Matter of Kung*, 17 I&N Dec. 260 (Comm. 1978) in support of his assertion that the petitioner, in spite of the restrictions imposed by the lease, should still be found to be in control of the business.

Upon review of the evidence, the petitioner has not established that it maintains a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). However, the AAO concurs that the director incorrectly focused on the restrictions imposed by the petitioner's lease agreement, 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 which employed the beneficiary are qualifying organizations). The evidence of stock ownership is not only material to the petitioner's claims, but critical to determining whether a qualifying relationship exists. The director's comments with respect to this issue will be withdrawn, as it appears that she did not properly review evidence related to the petitioner's stock ownership.

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.

In the present matter, the critical relationship is that between the foreign entity 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.

Upon review, the petitioner has failed to demonstrate the existence of the claimed affiliate relationship between the U.S. and foreign entities. The AAO acknowledges the submission of the minutes of the petitioner's organizational and annual shareholders meetings identifying the owner of the petitioner's stock as [REDACTED] as of September 2002. However, there are contradictions and omissions from the record that undermine the petitioner's claim that [REDACTED] is currently the sole owner, or even the majority owner, of the petitioner's stock.

As noted above, the petitioner's 2003 Form 1120, U.S. Corporation Income Tax Return, identifies the beneficiary as the majority owner of the U.S. company, and this inconsistent information has not been resolved. 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). 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*, at 591. The record does not contain the petitioner's stock certificates or stock transfer ledger and it is therefore impossible to make a determination as to its ownership and control as of the date the petition was filed. 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)). For this additional reason, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. The petitioner indicated that the beneficiary devotes more than half of his time to performing the operational tasks of the business, including locating vendors, resolving issues with vendors, supervising routine purchasing activities, reviewing new products and "acquisitions," and "coordinating" the procurement of inventory. The petitioner

has not established that any of these responsibilities would involve managerial or executive tasks. The actual duties themselves reveal the true nature of the employment. *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). An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(D) also requires the petitioner to submit 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. In response to the director’s request for evidence, the petitioner claimed to employ the beneficiary, a store manager, an assistant store manager/cashier, one full-time cashier, and one part-time cashier to operate a business that is open for 122 hours per week. Although two of the petitioner’s employees are designated as “managers,” the AAO notes that, based on the nature of the petitioner’s business, the hours of operation and the sample employee schedule provided by the petitioner, all of the petitioner’s employees would need to engage in the day-to-day tasks of the business in order to keep the business operational. The petitioner has not provided evidence of an organizational structure sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act. The petitioner has not established that it employed a staff sufficient to relieve the beneficiary from performing primarily non-qualifying first-line supervisory and/or operational duties. For this additional reason, the petition will 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).

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.