



U.S. Citizenship
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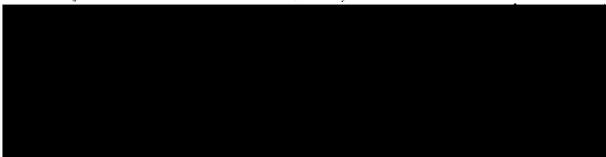
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FILE: SRC 04 184 53063 Office: TEXAS SERVICE CENTER Date: DEC 06 2006

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

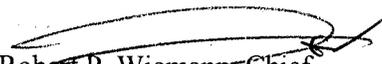
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president/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, a Texas corporation, claims to be the subsidiary of [REDACTED] located in Mumbai, India. The petitioner identifies itself as a trader of consumer goods. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; or (2) the petitioner had been doing business as required by the regulations.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous and that, contrary to the director's findings, the petitioner is qualified for the benefit sought. In support of this contention, counsel 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)(14)(ii) 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 matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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 a letter dated June 18, 2004, the petitioner stated that it currently employed three other persons in addition to the beneficiary. With regard to the qualifications needed to fill the beneficiary's position, the petitioner stated it was necessary to have "business experience, leadership qualities, planning and directing qualities, knowledge of trade and relations within trading community. College degree a plus."

A separate statement, entitled "Job Description for [the beneficiary]" provided the following overview of the beneficiary's position.

Financial Responsibilities: 40% time commitment.

- Responsible for maintaining the enterprise on sound financial footing.
- Primary contact with the bank to make timely deposits, responsible for timely payment to international suppliers.
- Primarily responsible for payments to local
- Primarily responsible for arranging
 - Working capital necessary to purchase inventory,
 - Pay employee salaries and
 - Pay the running expenses of the operation.

Operational Responsibilities: 40% time commitment.

Inventory Management:

- Responsible for vendor relations and inventory management.
- Responsible for maintaining optimum level of inventory.
- Responsible for ordering inventory in time, ensuring proper pricing and display.
- Responsible for maintaining proper accounts payable and sustaining vendor relations.

Personnel Management:

- Responsible for hiring and firing of employees.
- Responsible for work schedules on a daily, weekly and monthly basis.
- Ensuring that complete personnel files are maintained for all employees.
- Ensuring that proper screening of all employees.

Premises Management

- Responsible for lease negotiations, ensuring compliance with lease terms by the landlord.
- Responsible for security arrangements[.]
- In case of any mishaps, responsible for dealing with the local law enforcement.

Regulatory Responsibilities: 20% time commitment.

- Responsible for ensuring that all relevant licenses have been obtained and are current.
- Ensuring that proper procedures for maintenance of books of accounts.
- Ensuring proper calculation of taxes and timely payments to the local, provincial and federal government of India.

The petitioner also submitted a copy of its quarterly wage report for the quarter ending March 31, 2004, which demonstrated that \$1,500 in wages were distributed to the beneficiary during that quarter.

On July 15, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit an organizational chart for the petitioner; a more detailed description of the beneficiary's duties; a list of all subordinates of the beneficiary, with a description of each person's position title, duties and educational backgrounds.

In a response dated October 4, 2004, counsel resubmitted the previously submitted job description for the beneficiary. Counsel also provided an organizational chart, which demonstrated that the beneficiary directly supervised three employees: [REDACTED] office manager; [REDACTED] vendor relations; and [REDACTED] marketing and sales. The organizational chart further demonstrated that an assistant vendor relations employee, [REDACTED] worked under the vendor relations employee, and two outdoor salesmen, Saeed Ali and Bashir Hussan, both of whom were identified as contract employees, worked under the marketing and sales manager. No additional information about their position duties or educational backgrounds was provided.

The petitioner also submitted its quarterly tax return for the quarter ending June 30, 2004. The attachments demonstrated that during the three month period from April 1, 2004 to June 30, 2004, the petitioner employed the beneficiary, the office manager, the assistant vendor relations employee, and a fourth person not listed on the organizational chart.

On December 15, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner reasserts that the beneficiary, by virtue of his position as president, is by definition functioning in a managerial and/or executive capacity. Counsel resubmits and relies upon the position description of the beneficiary submitted with the initial petition and in response to the request for evidence. Counsel further contends that the small number of staff employed by the petitioner (six total) may not in and of itself be a basis for denial, and asserts that the director erroneously relied on staffing levels in rendering the denial without considering the reasonable needs of the petitioner and its stage of development.

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). The petitioner's description of the job

duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a vague overview of the nature of his duties; namely, that he would function as president and oversee virtually all aspects of the business, from the sales and marketing to human resources. Consequently, the director requested more specific information, including a more specific description of the beneficiary's duties. The petitioner responded to this request, yet did not expand on the beneficiary's day-to-day duties. Instead, the petitioner submitted the identical descriptions previously submitted, which the director had deemed insufficient.

Based on the evidence of record, the AAO is not convinced that the duties and the percentage of time the beneficiary allegedly devotes to each is an accurate portrayal of a typical workday. In sum, the description in the record claims that 40% of his time is devoted to financial duties, 40% to operational activities, and 20% to regulatory responsibilities. Although the petitioner briefly supplements these headings with general responsibilities, these statements are not adequate to clearly establish the exact day-to-day nature of the beneficiary's position. Despite the director's specific request for a more detailed description of the beneficiary's duties in the request for evidence issued on July 15, 2004, the petitioner failed and/or refused to respond to said request. 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).

It appears, therefore, upon review of the limited position description in the record, that the beneficiary is directly responsible for all aspects of running the business, including personnel, premises, and inventory, in addition to handling all financial aspects of the business. Finally, in addition to these tasks, it appears that the beneficiary directly handles all regulatory issues for the business, including the payment of domestic and foreign taxes. These generalized duties do not appear to fall directly under traditional managerial or executive duties as defined in the statute. While some of these areas would generally be recognized as the responsibilities of a manager or executive, the vague descriptions provided and the lack of sufficient subordinate staff at the time of filing suggest that the beneficiary directly handles most aspects of the business himself, instead of managing these operations. For example, the description emphasizes vendor relations and inventory management, services essential to the business but not generally considered managerial or executive. 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).

In addition, the petitioner claims on appeal that the beneficiary manages a staff of six persons (although the initial statement with the petition claimed that it employed a total of four persons, including the beneficiary). Although the beneficiary is not required to supervise personnel, if it is claimed that his 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.

At the time of filing, according to the most recent quarterly tax return filed on June 30, 2004, the petitioner employed only four persons. Although the petitioner claimed that additional employees were on its payroll, as well as independent contractors, the record indicates that at the time of filing on June 23, 2004, the petitioner employed only the office manager and the assistant vendor relations employee under the beneficiary. Although a third unidentified employee is noted on the return, this person is not listed by name or title on the organizational chart; therefore, it cannot be determined in what capacity this person was employed by the petitioner.

The organizational chart indicates that there is no person under the office manager's supervision. In addition, the assistant vendor relations employee allegedly answers to the vendor relations employee, whose position was not filled at the time of filing. There are no subordinate employees under the assistant vendor relations employee. The petitioner, therefore, has not shown that the beneficiary supervises subordinate staff members who themselves are supervisory or who manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. Additionally, since the petitioner failed to provide additional information on the subordinate employees, including their duties and educational backgrounds, it cannot be concluded that these positions require employees to possess a bachelor's degree or higher to perform the duties of the positions, such that they could be classified as professionals. Although there are three additional employees/contractors listed on the organizational chart submitted in response to the request for evidence, there is no documentary evidence to establish that these persons were actually on the petitioner's payroll at the time of the petition's filing. 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)). Thus, the petitioner has not shown that the beneficiary's alleged subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. The petitioner appears to have only recently retained the services of three additional persons to assist in sales services, in addition to the beneficiary and the other two employees. No explanation has been provided with regard to who performs the clerical and administrative duties of the company, thus suggesting that the beneficiary is responsible for these and many other unqualified duties. With regard to the petitioner's employees, counsel correctly observes that, when staffing levels are used as a determining factor in denying a visa to a multinational manager or executive, the reasonable needs of the organization in relation to its overall purpose and stage of development must be considered and addressed. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, there is no indication in this matter that the reasonable needs of the organization were not considered by the director. On the contrary, it appears the reasonable needs were considered, and the director concluded that the petitioner was incapable based on its overall purpose and stage of development to support a primarily managerial or executive position as defined by sections 101(a)(44)(A) and (B) of the Act.

In addition, it is important for Citizenship and Immigration Services (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.*

Moreover, in the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. Despite counsel's contentions on appeal, if the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the petition may not be approved.

The second issue in this matter is whether the petitioner has been doing business as required by the regulations for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as "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 of the qualifying organization in the United States and abroad."

In this matter, the petitioner claims that it is engaged in the trade of consumer goods. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

The record contains documents indicating that the petitioner is doing business as a "99 cents store." The record contains evidence of the petitioner's purchase of various wholesale items such as candy, novelty items, toiletry products, and household goods; however, there is no evidence that the petitioner has actually sold or traded these goods, as it claims in the petition. Additionally, its 2003 tax return shows gross sales of only \$8,451 for the year 2003. As a result of this insufficient documentation of a legitimate business operation, the director denied the petition on the basis that the petitioner had failed to do business as required by the regulations during the previous year.

On appeal, counsel asserts that the director misinterpreted the regulations in this matter by finding that the petitioner had to demonstrate that it had been doing business during its first year of operations. Counsel asserts that the requirement is that the petitioner show it can support a managerial or executive position within one year of commencement of the business, and emphasizes the word "within." Finally, counsel asserts that the director ignored the manner in which the petitioner's business matured in the previous year under the beneficiary's supervision.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from June 30, 2003 to June 30, 2004 to open a new office. The record further indicates that the petitioner would engage in the trade of consumer goods, although the petitioner's tax return for 2003 indicates that it is a hybrid business operating as a management consultant business. As previously

stated, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The petitioner has submitted only limited information regarding its business dealings, and provides no definitive statement describing the nature of its operation. As stated above, gross sales for 2003 totaled only \$8,451. Invoices demonstrate the purchase of goods, but not the resale of such goods. There is no indication of any continuous business activities and, additionally, the record contains no invoices pertaining to any business dealings of the petitioner prior to February 2004.

Based on this limited information, it is clear that the petitioner was not doing business for the previous year as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges the petitioner's claim that business was slow during this one-year period. However, the record is devoid of an explanation as to what the petitioner did from the time of commencement of the beneficiary's stay in June 2003 to the present, and further lacks any explanation or documentation regarding other activities engaged in by the petitioner to promote its business during this period. Furthermore, the petitioner does not acknowledge the discrepancy in the record with regard to its business activities. Although it claimed to be engaged in trading consumer goods, its tax return indicates it is a management consultancy firm.

Again, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. Despite the assertions of counsel, the evidence submitted at the time of filing was insufficient to establish that the petitioner had been conducting business as required. The fact that it began consistently improving its sales and hiring additional staff after the expiration of the beneficiary's initial stay does not entitle the petitioner to an extension of the requested visa classification, as it does not change the fact that the petitioner failed to conduct business during the previous year. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the minimal documentation of the petitioner's ownership raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In this matter, the petitioner claims that it is the subsidiary of the foreign entity by way of that entity's 100% ownership of its outstanding stock. Although the petitioner has submitted stock certificates attesting to the foreign entity's ownership of the U.S. entity, the record contains conflicting information. Specifically, the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2003, indicates on Schedule K, Lines 5 and 7, that the foreign entity owns 51% of its outstanding stock. 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).

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. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. 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).

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 at 1043.

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.