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File: WAC 04 109 50256 Office: CALIFORNIA SERVICE CENTER Date: JUL 17 2006

IN RE: Petitioner:
Beneficiary:

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

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
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 The decision of the director will be withdrawn and the case will be remanded for further consideration and action.

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). The petitioner is a corporation organized in the State of California that is engaged in the research, development and sales of performance equipment for cars. The petitioner claims that it is the affiliate of [REDACTED] located in Kwa-Zulu, South Africa. 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 beneficiary's services are to be used for a temporary period and the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States.

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 director's conclusions are in error. Counsel asserts that the beneficiary's duties in the United States are executive in scope and that the beneficiary's services in the United States are of a temporary nature.

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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first issue in the present 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 March 5, 2004 accompanying the initial petition, the petitioner described the beneficiary's job duties in the United States as follows:

As President, [the beneficiary] will direct the US business operations, including the expansion and establishment of business policies for the corporate entity and exercise full decision-making power for the company. [The beneficiary] will direct and coordinate corporate operations, including the establishment of budgetary and financial goals; the determination of marketing objectives; human resources policy; and the negotiation, conclusion and oversight of contracts.

Specifically [the beneficiary's] duties will include: retain and oversee legal representatives for corporate structuring, tax issues, corporate accounting and labor advice; direct a base engineering, business development and support staff; identify clients; define strategic operating and engineering design relationships between Alpine and its clients; negotiate and define deal structures with US/Canadian clients; manage all staff; retain responsibility for execution of all decisions, capital expenditure and personnel resources within Alpine companies; and, identify ongoing strategic direction for Alpine given the roster of identified business opportunities within the US/Canada. Alpine is in the process of moving the Research and Development Department from the South African location to the U.S., a corporate strategic decision made by [the beneficiary].

The petitioner also submitted a copy of its organizational chart showing the beneficiary as president. A deputy vice president, a vice president, and a technical director report directly to the beneficiary. An accounts manager, a sales/marketing manager, and a warehouse manager report to the vice president, and a technical

manager reports to the technical director, with all positions filled except for the warehouse manager. Below that level, the chart identifies a sales staff yet to be hired reporting to the sales/marketing manager; a warehouse worker and eight sub-contracted distributors reporting to the warehouse manager position; and a components design specialist and two yet-to-be-hired technicians reporting to the technical manager.

On March 17, 2004, the director requested additional evidence, including: (1) a copy of the U.S. entity's organizational chart describing its managerial hierarchy and staffing levels, with the current names of all executives, managers, supervisors, and number of employees within each department or subdivision; the chart should clearly identify the beneficiary's position and list all employees under the beneficiary's supervision by name and job title; (2) a brief description of job duties, educational levels, annual salaries/wages for all employees under the beneficiary's supervision; (3) copies of the U.S. company's payroll summary and Forms W-2 and W-3 evidencing wages paid to employees; and (4) copies of the U.S. company's Form DE-6, California Quarterly Wage Reports, for all employees for the last four quarters.

In a response dated June 4, 2004, the petitioner submitted a new organizational chart, which appears to have been updated since the initial petition was filed. The new chart shows that the technical director position has been eliminated, the warehouse manager position has been filled, the warehouse worker position is now vacant, and there are different individuals in the positions of accounts manager and sales manager. The petitioner also provided a description of job duties, educational levels, annual salaries/wages for each employee under the beneficiary's supervision listed on the organizational chart. The petitioner restates the original job description for the beneficiary, with the following addition:

A recent example of an executive business operations decision made by [the beneficiary] was to move the research, design and development department from South Africa to Orange County, CA. This decision was based on the fact that S.A. Alpine's clients . . . are also located in Orange County and the design team will profit from closer contact with the client's designers and engineers.

The petitioner submitted the U.S. company's Forms W-2 and W-3 for the years 2002 and 2003; California Form DE-6 for the quarters that ended June 30, September 30 and December 31, 2003 and March 31, 2004; California Form DE-7 for the year 2003; and the company's payroll for the two-week periods ending April 30, 2004 and May 15, 2004.

On June 17, 2004, the director denied the petition. The director determined that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The director observed that the record indicates that a preponderance of the beneficiary's duties will be directly providing the services of the business. The director further found that the record does not show that the U.S. entity has the organizational complexity to support an executive or managerial position, and there is insufficient evidence on record of a subordinate staff of professional, managerial, or supervisory personnel who would relieve the beneficiary from performing non-qualifying duties. The director noted in particular that at the time of filing, the petitioner's Form DE-6 for the first quarter of 2004 lists only two employees.

On appeal, counsel for the petitioner asserts that the beneficiary's duties in the United States are executive in scope. Citing examples from the descriptions of the beneficiary's job duties, counsel contends that the beneficiary's job duties meet all four prongs of the definition of executive capacity set forth under 8 C.F.R. § 214.2(l)(1)(ii)(C). Counsel further asserts that the petition should not be denied based on the small number of employees on payroll in the U.S. office. Counsel points out that although there were only two employees on payroll at the time the petition was filed, the record indicates that there are three other employees, including the beneficiary, who as shareholders opted to reinvest profits in the company rather than draw a salary.¹ Citing to a number of unpublished decisions, counsel seeks to distinguish this petition, where the beneficiary is the highest ranking executive, from other petitions filed by small companies that were denied on appeal because the beneficiaries were not found to be performing at a sufficiently high level in the organizational hierarchy.

Upon review, the AAO finds that the record is sufficient to establish that the beneficiary would perform in a primarily executive capacity in his position in the U.S. entity. 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). Although the description of the beneficiary's duties contains some generalities, the overall description coupled with the petitioner's organizational structure is sufficient to establish that the beneficiary's role is primarily executive. The record is sufficient to establish that as the highest ranking executive in the company, the beneficiary directs the management of the organization, establishes the goals and policies of the organization, and is in a position to exercise wide latitude in discretionary decision making. Moreover, contrary to the director's decision, the AAO finds that the totality of evidence in the record relating to the other employees of the U.S. entity supports the conclusion that with the company's organizational structure and staffing level at the time the petition was filed, the beneficiary would not have to engage directly in non-qualifying day-to-day operations of the company, but instead would be performing primarily the high level responsibilities specified in the definition of executive capacity.

Based on the foregoing, the AAO finds that the petitioner has established that the beneficiary would be employed in the United States in a primarily executive capacity, as required by 8 C.F.R. § 214.2(l)(3). The director's decision on this issue will be withdrawn.

The second issue in this proceeding is whether the beneficiary's services in the United States are to be used for a temporary period and whether the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States.

In the March 5, 2004 letter accompanying the initial petition, the petitioner indicated that the beneficiary holds 51% of the foreign entity and continues to be the president of that company as well as the U.S. entity. The letter further stated that the beneficiary would be transferred to the United States for a temporary period of three years.

¹ The AAO notes that the petitioner submitted Forms W-2 for eight employees for 2003, and the payroll records for two pay periods in April and May 2004 show that there were eight or nine employee on payroll. Not all of these employees were listed on the organizational chart.

In denying the petition, the director found that the petitioner has not shown that the beneficiary's services in the United States are to be used for a temporary period and the beneficiary will be transferred to an assignment abroad upon completion of the assignment in the United States. The director noted that the petitioner for an L-1 nonimmigrant classification generally needs to submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, the director observed, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Iovic*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). The director concluded that since the record indicates that the beneficiary is the majority owner of this petitioning organization, the single statement in the March 5, 2004 letter that the beneficiary intends to stay in the U.S. for a three-year period is not sufficient to satisfy the requirement for a "greater degree of proof" of the beneficiary's temporary stay in the United States.

On appeal, counsel contends that the director's decision is in error. Counsel asserts that foreign nationals under consideration for L-1 classification are not subject to the requirement of having "a residence in a foreign country, which [the nonimmigrant] has no intention of abandoning" applicable to other nonimmigrant classifications under section 101(a)(15) of the Act. Counsel further contends that both the Citizenship and Immigration Service (CIS) and the State Department recognize that a foreign national in L-1 status may have the dual intent of immigrating to the United States if allowed to do so – while still intending to comply with his or her temporary nonimmigrant status. Finally, counsel states that the beneficiary understands that his services are of a temporary nature and intends to return to his home country where he and his spouse have significant business interests and assets. In support of this last assertion, counsel refers to evidence in the record documenting the beneficiary's majority interest in the foreign entity and evidence submitted on appeal relating to the travel business of the beneficiary's spouse.

At the outset, the AAO finds that counsel's arguments regarding dual intent and the lack of a residency requirement for L-1 status are inapposite to the issue at hand. However, with respect to the sufficiency of the evidence of record to establish that the beneficiary's services in the United States are to be used for a temporary period, the AAO notes that while the director did issue a request for further evidence prior to adjudicating the petition, there was no request for further evidence relating to that issue. The director's decision to deny the petition on that ground thus appears to be based solely on the evidence submitted with the initial petition. The regulation at 8 C.F.R. § 103.2(b)(8) provides:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefits or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence, and may request additional evidence, including blood tests.

In this instance, since the missing initial evidence was not requested prior to adjudication as the regulations require, the director's determination that the record is insufficient to establish that the beneficiary's services in the United States are to be used for a temporary period will be withdrawn. This matter will be remanded, and the director is instructed to request the evidence required under the regulations at 8 C.F.R. § 214.2(l)(3)(vii)

and such additional evidence as the director may deem necessary to determine the petitioner's eligibility for the benefit sought in this matter.

On a related issue, the AAO notes that counsel points to the beneficiary's majority ownership in the foreign entity as evidence of his intent to stay in the United States temporarily. However, the AAO finds that there is insufficient evidence in the record to support the claim of the beneficiary's majority ownership in the foreign entity. In fact, although the director's decision is silent on this issue, the AAO finds that the record as it now stands is insufficient to demonstrate that a qualifying relationship exists between the U.S. and foreign entities as required under the regulation at 8 C.F.R. § 214.2(l)(3)(i).

The regulations 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 (BIA 1988); *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.

The petitioner claims that the two entities are affiliated by virtue of common majority ownership by the beneficiary. Specifically, the petitioner indicates on Form I-129 that the beneficiary holds 51% of the foreign entity and 63% of the U.S. entity. The petitioner submitted with the initial petition copies of three stock certificates of the U.S. entity: certificate number 3, dated March 21, 2002, indicating that [REDACTED] holds 1,800 of the company's 10,000 authorized shares; certificate number 6, undated, indicating that the beneficiary holds 6,300 of the company's 10,000 authorized shares; and certificate number 7, undated, indicating that [REDACTED] holds 1,900 of the company's 10,000 authorized shares. In addition, the petitioner submitted the U.S. entity's Internal Revenue Service Forms 1120, U.S. Corporate Income Tax Return, for the years 2002 and 2003, which report that the beneficiary holds 64% of the company. There is no other documentation in the record relating to the ownership and control of the U.S. entity.² The only evidence of record relating to the ownership and control of the foreign entity is a copy of a letter dated February 22, 2004 from the foreign entity's chartered accountants, stating that the beneficiary "currently holds the majority of the Company's issued share capital."

² The AAO notes that the Form I-129 and the stock certificate indicate that the beneficiary holds 63% of the U.S. entity, whereas the IRS Forms 1120 states the beneficiary's holdings as 64%. There is no clarification of this discrepancy on the record. 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 petitioner did not submit copies of the U.S. entity's stock certificates number 1, 2, 4, and 5, or any evidence that the certificates it did submit, number 3, 6, and 7, indeed represent all of the issued and outstanding shares of the company as of the date the petition was filed. Furthermore, 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. 362. The petitioner has not provided any of these additional documents in connection with the U.S. entity. Furthermore, it is noted that the only document submitted to support the claim of the beneficiary's majority ownership in the foreign entity fails to confirm even the exact percentage of the beneficiary's holding in that company. Without full disclosure of all relevant documents, CIS cannot determine the elements of ownership and control with respect to the U.S. and foreign entities, or draw any conclusion as to whether a qualifying relationship exists between the two entities.

Thus, the record as presently constituted is insufficient to establish that there exists a qualifying relationship between the U.S. and foreign entities. However, the AAO notes that the director's request for further evidence prior to adjudication did not include a request for further evidence of the qualifying relationship between the U.S. and foreign entities. Again, to the extent initial evidence is missing, or the director finds that the evidence submitted with the initial petition either does not fully establish eligibility for the requested benefits or raises underlying questions regarding eligibility, the director is required under the regulations to request the missing initial evidence. *See* 8 C.F.R. § 103.2(b)(8).

In light of the foregoing, the director's decision in this matter is withdrawn. This matter will be remanded for further action. The AAO finds that the record is sufficient to establish that the beneficiary would be employed in the United States in a primarily executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(ii). With respect to the issues of whether the petitioner has established that (1) the beneficiary's services in the United States are to be used for a temporary period and the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, and (2) there is a qualifying relationship between the U.S. and foreign entities, as required by the regulations at 8 C.F.R. §§ 214.2(l)(3)(i) and (vii), the director is instructed to request further evidence as described above and such additional evidence as the director may deem necessary to determine the petitioner's eligibility for the benefit sought in this matter, and to enter a new decision.

ORDER: The decision of the director is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which if adverse to the petitioner, shall be certified to the AAO for review.