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Washington, DC 20529

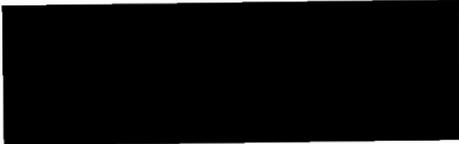


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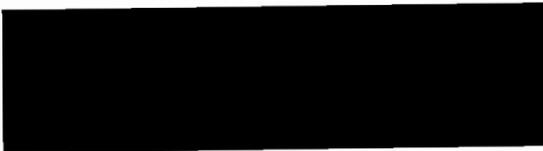
File: LIN 04 183 50122 Office: NEBRASKA SERVICE CENTER Date: OCT 23 2006

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, Nebraska 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 visa petition seeking to extend the employment of its manager of business operations 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 under the laws of the State of Washington and is allegedly engaged in the business of operating a restaurant and selling mobile phone accessories. The petitioner claims a qualifying relationship with M/S Global Trends of Karachi, Pakistan. 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 for three years.

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

The petitioner 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, the petitioner asserts that the director erred in denying the petition because the record establishes that the beneficiary is employed in a executive capacity. The petitioner submits a brief in support of its 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 primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily executive capacity.<sup>1</sup>

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.

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<sup>1</sup>Counsel's letter dated June 8, 2004, the petitioner's letter dated November 12, 2004, and the petitioner's appellate brief all state that the petitioner is seeking to classify the beneficiary as an executive and not as a manager. Therefore, the AAO will consider the petition as one seeking to classify the beneficiary as an executive and not as a manager.

The petitioner described the beneficiary's job duties in a letter dated June 8, 2004, appended to the initial Form I-129, as follows:

[The beneficiary d]irects the management of our company by overseeing the operation of the Subway [restaurant]. [The beneficiary] is also continuing to [investigate] the possibility of [the petitioner] venturing into the sale of computer hardware in the Washington area.

[The beneficiary e]stablishes the goals of the organization, by setting and evaluating the monthly and annual performance goals of the company.

[The beneficiary e]xercises wide latitude in discretionary decision making. In fact he makes all hiring and firing decisions and has wide latitude in all day to day operations of the business. He is responsible for the implementation of the overall policies and objectives of the company, as established by the board of directors.

- [The beneficiary r]eceives only general supervision or direction. [The beneficiary] reports to the president on a monthly basis. Additionally, [the vice president] is always available to him if he wishes to consult with [her] on any particular matter. He will make semi-annual reports to the Board.

On August 23, 2004, the director requested additional evidence including a detailed description of the beneficiary's job duties.

In response, the petitioner provided a letter dated November 12, 2004, which includes a description of the beneficiary's past and future job duties and a breakdown of how much time the beneficiary devoted, or will devote, to each duty:

[During the last twelve months, the beneficiary] has spent his time as follows.

40% of his time has been spent in oversight of the [initial] Subway [restaurant] [o]perations

25% of his time has been spent in research and negotiations regarding our second franchise operation and discussing these matters with [the vice president] and/or the Board

20% of his time has been spent in research and negotiations regarding the decision not to renovate our current [Subway] store location, but instead to build a new store in another Bothell location and discussing these matters with [the vice president] and/or the Board

15% of his time has been involved in researching and negotiating the best purchasing arrangements for our Pakistan computer operations and researching the feasibility of our opening a U.S. computer sales operation and discussing these matters with [the vice president] and/or the Board as well as advising us regarding the cell phone sales

operations.

\* \* \*

Over the course of **the next two years**, [the vice president estimates] that [the beneficiary] will spend his time as follows:

40% of his time will be spent in oversight of our two Subway locations (Bothell and Cascadia)

15% of his time will be spent in negotiating all the final arrangements regarding our second franchise operation and setting up this store, from the design of the store, to the staffing, and layout and discussing these matters with [the vice president] and/or the Board, as well as training and setting up of operations until the store is running smoothly.

10% of his time will be spent in negotiating all the final arrangements regarding the construction of the new store in Bothell and discussing these matters with myself and/or the Board

30% of his time will continue to be involved in researching and negotiating the best purchasing arrangements for our Pakistan computer operations while as the same time during the later [sic] part of this two year period (i.e. after the new Bothell location is up and running and the new Cascadia operation is operating smoothly) he will return to researching the feasibility of [the petitioner] opening a U.S. computer sales operation and discussing these matters with [the vice president] and/or the Board.

5% of his time will be spent researching the feasibility of our expanded cell phone operations in the U.S.

The petitioner also explained in its November 12, 2004 letter that the petitioner employs nine people, including the beneficiary. The organizational charts submitted by the petitioner also show nine employees and further indicate that eight of these subordinate employees work at the Subway restaurant(s) while the beneficiary, who supervises these restaurant employees, also supervises the employees of the foreign entity in Pakistan. Moreover, the petitioner explains that the Subway restaurant is managed by a manager and an assistant manager and that both of these employees report to the beneficiary.

On March 12, 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred in denying the petition and that the beneficiary is primarily employed as an executive. The petitioner specifically points to the beneficiary's role in overseeing the Subway restaurants, his establishment of a new location or locations, and his research and investigation regarding an expansion into computer and mobile telephone sales.

Upon review, petitioner's assertions are not persuasive.

Title 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 support an executive or managerial position. There is no provision that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, 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 executive position as defined by law.

When examining the executive 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.*

In this matter, the petitioner has failed to prove that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee.

The petitioner in this matter is primarily engaged in operating a Subway restaurant. The job description and other documents provided by the petitioner indicate that the beneficiary spends a substantial portion of his time (40%) overseeing the operation of the restaurant. While the petitioner asserts that a manager and an assistant manager supervise the other restaurant workers and that the beneficiary, in turn, supervises the restaurant managers, this assertion is not corroborated with any documentary evidence such as job descriptions for the managers, hours on duty, or any independent analysis regarding the organization or management of a Subway restaurant. Therefore, given the vague explanation of the roles of the various subordinate employees, it cannot be determined whether there is a material difference between the "sandwich artists" and the managers, and Citizenship and Immigration Services (CIS) cannot determine whether the restaurant has an organizational complexity sufficient to support an executive employee. As explained above, the beneficiary must be free to focus primarily on broad goals and policies and not on the day-to-day operations of the enterprise. The petitioner has failed to credibly establish that the subordinate Subway employees permit the beneficiary to act primarily as an executive.

Regardless, the petitioner has not established that the remaining duties of the beneficiary, which will take up 60% of his time, are primarily executive in nature. As explained by the petitioner, the beneficiary will spend this time establishing a new Subway restaurant, making changes to the current restaurant, purchasing computers and accessories for the foreign entity, and researching the feasibility of expanding into computer

and mobile telephone sales. While the ultimate responsibility for carrying out such functions could be executive in nature in certain circumstances, also inherent in these duties are many administrative, clerical, and operational functions, i.e., typing correspondence, bookkeeping, and processing payments for supplies. Importantly, the petitioner failed to explain whom, other than the beneficiary, would perform these inherent, non-qualifying duties and failed to explain how much time the beneficiary will spend performing these non-qualifying duties. The organizational chart is clear that all the employees subordinate to the beneficiary are engaged in operating the Subway restaurant. The petitioner has no employees dedicated to relieving the beneficiary of performing non-qualifying operational tasks associated with those duties which take up 60% of his time. Therefore, the petitioner has not established that the beneficiary is primarily employed in an executive capacity. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). It is appropriate for 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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive capacity as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, a related issue is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

- (A) Evidence that the United States and the foreign entity are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section[.]

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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." A "subsidiary" is defined, in part, as a legal entity "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

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 the initial Form I-129 petition, the petitioner asserts that the foreign entity, M/S Global Trends, is a "subsidiary company" of the petitioner. The petitioner alleges that it purchased the foreign entity in 2003 and currently owns and operates this business in Pakistan. In support of this assertion, the petitioner provided copies of 2003 Pakistani tax documents which indicate that the foreign entity is a business, apparently a sole proprietorship, owned by the beneficiary. The petitioner also provided 2004 Pakistani tax documents which supposedly establish that the petitioner is now doing business as Global Trends, the foreign entity, and that the petitioner owns and controls the foreign entity. However, the petitioner failed to provide any evidence regarding the conveyance of the foreign business or its assets, the consideration paid for the business, the beneficiary's employment by the foreign business after its alleged acquisition, the legal form of the foreign business before or after its alleged acquisition, or the ownership structure of the foreign business. Moreover, the only documents provided evidencing the ownership of the petitioner are Schedules K to the petitioner's Form 1120S. The petitioner did not provide stock certificates, articles of incorporation, or any other organizational materials. The Schedules K reveal that the beneficiary does not have an ownership interest in the petitioner.

Upon review of these documents, the petitioner has not established that it has a qualifying relationship with the foreign employer.

First, the record is devoid of any evidence establishing the ownership of the foreign entity. As explained above, the petitioner has failed to provide any documents establishing ownership or control, or that the petitioner acquired the foreign entity in 2003. The 2004 Pakistani tax documents are not sufficient evidence of ownership and control of the foreign entity.

Second, the petitioner has provided insufficient evidence to establish the ownership and control of the United States operation. 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. Here, the petitioner has not even provided stock certificates to prove the ownership of the petitioner; therefore, CIS is unable to determine the elements of ownership and control of the petitioner.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed.

Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.