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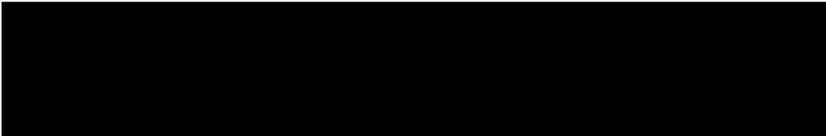
U.S. Department of Homeland Security
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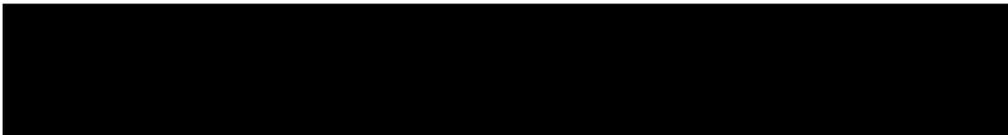


File: EAC 06 036 50761 Office: VERMONT SERVICE CENTER Date: **AUG 03 2007**

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, Vermont 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 seeks to extend the temporary employment of the beneficiary as its general manager in the United States 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 corporation organized in the state of New York, claims to be engaged in manufacturing and installation of steel products. It also claims to be the subsidiary of Foulad Fabrication & Engineering located in Pakistan. The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. On appeal, counsel for the petitioner asserts that the director erred by concluding that the beneficiary was not employed in a qualifying capacity. Specifically, counsel for the petitioner asserts that, despite its small size, the petitioning entity, which is still in a start-up phase, required the assistance of the beneficiary with regard to routine day-to-day services.

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) 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 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.

With the initial petition, counsel for the petitioner briefly describes the beneficiary's duties in a letter dated November 3, 2005. Specifically, counsel stated:

[The beneficiary] is manager and supervisor of the subsidiary of United States of America. [The beneficiary] is working very hard and negotiating with the U.S. companies for more business. With the effort of his managerial skill [sic], he made few new contracts with other companies in the United States. For example: [the petitioner] made an agreement with [REDACTED] [REDACTED] on September 28, 2005 for [\$]28,500.00. There was other [sic] contract with the [REDACTED] for [\$]37,500.00 in 2004 that the [petitioner] will fabricate and install Steel structures as per drawings and specifications. Under [the beneficiary's] supervision, hard work and Skill Company is making tremendous progress in fabrication and steel business.

The petitioner also submitted a copy of its 2004 Form 1120, U.S. Corporation Income Tax Return. The form showed that no wages or salaries were paid by the petitioner during 2004.

On December 30, 2005, the director requested additional evidence with regard to the beneficiary's managerial and/or executive capacity. Specifically, the director requested a complete description of the beneficiary's duties, as well as a breakdown of the number of hours the beneficiary and his fellow employees would devote to each of their stated duties. In a response dated March 23, 2006, the petitioner, through counsel, submitted a response to the director's request. With regard to the beneficiary's duties and the amount of time he devoted to each, counsel stated:

[The beneficiary] has performed his duties with due diligence and in a highly professional manner. The parent company is highly satisfied with [the beneficiary's] performance in the past. However, [the beneficiary's] purposed [sic] duties in the future are as follows:

As a general manager or project coordinator [the beneficiary] will use his independent discretion and authority in exploring the American market for future clients and develop strong and mutually beneficial relationships with American companies. [The beneficiary]

will ensure that [the petitioner] is providing the products and services and using the best material available and providing top notch customer service for clients' satisfaction. [The beneficiary] will be responsible for expanding, organizing, directing and developing the capabilities in this area. [The beneficiary] will dedicate approximately 70% of his time performing these functions.

[The beneficiary] will participate in seminars, exhibitions, and meet with the other professional[s] in similar field. [The beneficiary] will prepare reports and inform the foreign company from time to time. [The beneficiary] will explore the new opportunities and buy the state of the art equipments [sic] to satisfy the NCA of any other agency's rules and requirements. [The beneficiary] will dedicate 30% of his time to performing these functions.

As it [sic] has already been mentioned that employees will work as required. However [the beneficiary] spend[s] approximately 70 hours on a weekly basis performing his duties.

The petitioner also submitted a copy of its 2005 Form 1120, U.S. Corporation Income Tax Return. This form, like the 2004 return, showed that no wages or salaries had been paid to employees by the petitioner.

On May 22, 2005 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that the beneficiary appeared to be responsible for performing most of the duties essential to the operation of the business. The director noted that, despite the claim that two other employees rendered services to the petitioner, the beneficiary appeared to be actively involved in performing the services of the operation. On appeal, counsel argues that by virtue of the newness of the petitioner in the marketplace, it is necessary to use every resource available, including the services of the beneficiary, to expand business operations. Counsel also claims that the director overlooked the claim that independent contractors were hired on an as-needed basis when relevant job orders were received.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the current structure of the petitioner's enterprise, it appears that the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial or executive.

While the beneficiary is the intended general manager of the company, there is insufficient evidence to show that he will be acting primarily in a managerial or executive capacity during his U.S. employment. 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(1)(3)(ii). In this case, the petitioner fails to sufficiently document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. While the AAO notes that in response to the request for evidence the petitioner claimed that 70% of the beneficiary's time is spent performing his duties as a general manager, many of the identified duties, such as "exploring the American market for future clients" and "develop[ing] strong and mutually beneficiary relationships with American companies," are not traditionally considered managerial or executive duties. For this reason, the AAO cannot determine whether the beneficiary is primarily performing

the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Since this description of the beneficiary's duties, which includes both managerial and administrative or operational tasks, fails to quantify the time the beneficiary spends on them, the AAO cannot determine what an average day or week consists of for the beneficiary. In addition, the fact that no documentary evidence has been submitted to show that the petitioner actually employs the two subordinate employees it claims will relieve the beneficiary from non-qualifying tasks suggests that the beneficiary will be performing all of the operational and administrative tasks for the petitioner.

As stated above, both the petitioner's 2004 and 2005 tax returns indicate that no salaries or wages were paid to any persons during those years. Additionally, despite the petitioner's claim that it regularly uses contractors as necessary to perform extra work, no evidence of any wages paid to persons, or contracts for their services has been submitted. Hence, since the beneficiary appears to be the petitioner's sole employee and since many of his identified duties are non-qualifying in nature, it appears that he is not employed in a primarily managerial or executive capacity. 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).

Furthermore, counsel on appeal essentially acknowledges that the beneficiary performs many non-qualifying duties, arguing that the youth of the petitioning enterprise requires these services. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In this case, however, the petitioner indicated on the Form I-129 that the beneficiary *would not* be coming to the United States to open a new office. Furthermore, the record indicates that the company was established in 2002. Therefore, a presumption exists that the U.S. entity should be sufficiently operational and established, thus obviating the need for a manager or executive to engage in non-qualifying tasks. Clearly this is not the case in the instant matter, as demonstrated by the beneficiary's hands-on duties and definitive obligation to fill in for absent subordinate employees due to the small size of the petitioner and the lack of other employees to relieve the beneficiary from engaging in such actions. The AAO is therefore precluded from determining that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Additionally, the director noted that the beneficiary's B-2 nonimmigrant status expired on February 18, 2002. While the initial L-1 new office petition had been approved, the beneficiary was out of status at the time, and his request for a chance of status was properly denied. Since the beneficiary had not left the U.S. prior to the filing of the instant petition, the director noted that he was subsequently out of status at the time of filing. On appeal, counsel concurs with the director's findings. As the issue of the beneficiary's current unlawful presence in the United States is not reviewable by the AAO, however, his ten year inadmissibility will not be addressed in this decision.

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the petitioner and the foreign employer. Although the petitioner claims to be a wholly-owned subsidiary of the foreign entity, the petitioner has failed to submit sufficient evidence to support this claim.

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 (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.

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.*, *supra*. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

In this matter, the petitioner submits share certificate number 2, showing that the foreign entity owns 200 shares. However, there is no explanation regarding share certificate number 1, nor has the stock ledger been submitted. Furthermore, the petitioner's Forms 1120 for 2004 and 2005 indicate on Schedule K that there are no foreign corporate shareholders. Moreover, one of the subcontractor agreements submitted indicate that the owner of the petitioner is the beneficiary, not the foreign entity. 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). As such, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer, and the petition must be denied for this additional reason.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.

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ORDER: The appeal is dismissed.