U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: SRC 02 118 50043 Office: TEXAS SERVICE CENTER Date: AUG 02 2004

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 was incorporated in the State of Maryland in June 2000. Subsequently, the petitioner moved its offices to the State of Florida. The record contains a Florida Department of State Division of Corporations document indicating that the petitioner is a "foreign profit" organization. The document shows that it was filed October 31, 2000. The petitioner claims to operate a retail store. It seeks to extend the temporary employment of the beneficiary as president and chief executive officer for an additional three years. Accordingly, it filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee.

The director denied the petition determining that the petitioner had not established: (1) it met the criteria for a qualifying organization; (2) that the new office had been doing business for the year prior to filing the petition; (3) that the foreign company was currently doing business; and (4) that the beneficiary had been and would continue to be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner contends that the evidence submitted in support of the petition had not been properly evaluated.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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) states 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 position 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(14)(i) requires "[A] petition extension may be filed only if the validity of the original petition has not expired." In this matter, the initial L-1A nonimmigrant visa was issued March 2, 2001 and expired March 1, 2002. The petition was filed March 4, 2002.

The first issue in this proceeding is whether a qualifying relationship exists between the foreign and U.S. entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) Affiliate means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner stated on the petition that the petitioning organization continued to be a subsidiary of the beneficiary's foreign employer. The petitioner submitted its 2000 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The 2000 IRS Form 1120 on a statement accompanying Schedule K, listed the beneficiary as the petitioner's 100 percent owner. The 2000 IRS Form 1120 on Schedule L showed that no stock had been issued.

On May 20, 2002, the director issued a request for evidence, asking that the petitioner provide evidence of the ownership of the foreign entity. The director also requested an explanation regarding the information on the petitioner's IRS Form 1120. In response, the petitioner stated that the information on the petitioner's IRS Form 1120 "inadvertently mentioned the beneficiary's name instead of [the claimed parent company]." The petitioner submitted a stock certificate dated June 11, 2000 showing 100 shares had been issued to the claimed foreign entity. The petitioner also provided a copy of an unfiled IRS Form 1120X, Amended U.S. Corporation Income Tax Return for the year 2000 and its 2001 IRS Form 1120. Both the 2000 IRS Form 1120X and the 2001 IRS Form 1120 showed the beneficiary's foreign employer holding a 100 percent interest in the petitioner.

The director observed that the petitioner's tax returns contained inconsistencies and that the petitioner had not provided evidence that the amended return had been filed. The director also questioned the authority of the beneficiary to act on behalf of the foreign corporation and whether the petitioner had filed the necessary reports to avoid dissolution in the State of Florida. The director concluded that the petitioner had not provided sufficient evidence to establish a qualifying relationship between the U.S. company and the beneficiary's foreign employer.

On appeal, the petitioner claims that the 2000 IRS Form 1120X was mailed to the IRS and asserts that the inconsistencies in the IRS Forms 1120 are immaterial. The petitioner also offers explanations regarding the authority of the beneficiary to act on behalf of the foreign corporation and submits evidence that it filed the appropriate reports to do business in Florida.

The petitioner's claim and assertion are not persuasive. 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 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. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

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 the present matter, the petitioner has provided little evidence to establish that a foreign entity owns and controls the petitioner. The petitioner's assertion that the inconsistencies in the IRS Forms are immaterial is not persuasive. The petitioner's 2000 and 2001 IRS Forms 1120 at Schedule L do not show that the petitioner has issued any stock. The petitioner has not offered an adequate explanation for this deficiency. Instead the petitioner provides a stock certificate representing that it has issued 100 shares and its Articles of Incorporation indicating that it is authorized to issue 10,000 shares with a par value of $10.00 per share. This obvious inconsistency undermines the petitioner's claim it is a legitimate company owned by a 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).

Further, simply asserting that the representation on its 2000 IRS Form that the beneficiary was the petitioner's sole shareholder was inadvertent does not qualify as independent and objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Moreover, the petitioner's failure to document that it actually filed an amended tax return does not lend credence to the petitioner's claim. Further, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

In sum, the record remains deficient in establishing that a qualifying relationship exists between the petitioner and the foreign entity.

The second issue in this proceeding is whether the petitioner established that its new office was doing business for the year prior to filing the petition. The petition was filed in March 2002.

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 the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations 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." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations 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.

The petitioner initially provided: (1) several invoices dated April 2000 showing its address at 7521 N.W. 8th Street, Miami, Florida; (2) two invoices dated October 2000 showing its address at 9572 N.W. 41st Street, Miami, Florida; (3) one invoice dated December 2000 showing its address at 777 N.W. 72nd Avenue; (4)

several invoices dated in February March, and April 2001 also showing its address at [redacted] and, (5) two invoices dated March 2001 showing its address at [redacted] The petitioner also provided a copy of a sublease agreement showing that it had moved its location from [redacted] to [redacted] The sublease was for an initial period of July 1, 2001 through December 31, 2001 and was for shared premises with an unrelated entity. The petitioner provided copies of additional invoices dated from August 2001 showing the petitioner's address at the new location.

The director requested evidence showing the petitioner conducted business during the current year including invoices, bills of lading, shipping receipts, orders, customs forms, and a lease for the address identified on the submitted documents.

In response, the petitioner submitted copies of its bank statements, several 2002 invoices and bills of lading, utility bills, its accountant's letter and unaudited balance sheet and income statement. The petitioner also submitted a lease for the [redacted] premises. The petitioner also provided its IRS 2001 Form 1120 which shows $168,420 in gross receipts, $20,500 in compensation to the beneficiary as an officer, $7,547 paid in salaries, and negative $46,840 in net taxable income.

The director incorrectly observed that the petitioner had only submitted invoices with the name of the company that shared the premises located at 1901 N.W. 20th Street.

On appeal, the petitioner explains that it was initially incorporated in the State of Maryland in June 2000, but transferred its business to the State of Florida in September 2000. The petitioner further explains that it imported merchandise and entered into a lease for a warehouse and showroom. The petitioner claims that it started its wholesale business in January 2001 at the [redacted] location and then moved to the [redacted] address in July 2001.

The petitioner's explanations and the evidence submitted are persuasive. The record contains sufficient evidence to show that the petitioner had been conducting business on a regular, systematic, and continuous basis for the year prior to filing the petition. The director's decision will be withdrawn as it relates to this issue.

The third issue in this proceeding is whether the foreign company continues to conduct business, thus maintaining a qualifying relationship with the petitioner.

As discussed above, the petitioner has provided inconsistent documentary evidence of its qualifying relationship with the overseas entity. Further, the petitioner has provided numerous untranslated documents to establish that the foreign entity is doing business. The regulation at 8 C.F.R. § 103.2(b)(3) states:

> Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

On review, there is insufficient documentation to establish that the foreign company is actively engaged in the regular, systematic, and continuous provision of goods or services as an employer in the United States or in a foreign country. Therefore, it cannot be concluded that the petitioner has established that the foreign parent

company is a qualifying organization as required by the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). For this additional reason, the petition may not be approved.

The fourth issue in this proceeding is whether the beneficiary was employed in a primarily managerial of executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
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> (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), provides:

> The term "executive capacity" means 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 submitted with the petition, the petitioner stated the job description for the beneficiary's position as:

> PRESIDENT AND CHIEF EXECUTIVE OFFICER (President) will be overall responsible person for the corporation. He will ensure a timely and effective startup, establishment, and management of the new office of [the petitioner] and delegate his authorities to the Vice President and managers judiciously, as and when applicable. He will directly and indirectly supervise all employees of the company and contractual independent contractors (Sales Reps. Etc.). President will coordinate and communicate with the Vice President and the top management of the parent company, as needed. He will formulate and specify all short-term and long-term business plans, company goals and objectives, corporate policies, budget, and marketing strategies. President will review reports and data on the company business and regularly submit the same to the board of Directors and the parent company for their review, approval, and records.

The petitioner also listed the beneficiary's duties as including meetings with the vice-president and managers, directing and supervising staff, and reviewing recommendations from the vice-president. The petitioner added that the beneficiary would be the officer responsible for complying with all state, local, and federal requirements and for traveling extensively within the United States and overseas to develop marketing networks and contracts abroad.

The petitioner also submitted its proposed organizational chart to be in place by the end of the year 2002. The petitioner submitted three 2001 IRS Forms W-2 issued to the beneficiary and two employees.

The director requested additional information regarding the position titles, duties, and qualifications for the two employees in addition to the beneficiary. The director also requested the petitioner's state quarterly tax returns for 2001 and 2002.

In response, the petitioner indicated that when the petition was filed in 2002 it employed one individual working full-time, in addition to the beneficiary. The petitioner indicated the employee worked as a sales clerk and administrative person. The petitioner's Florida Form FLUCT61, Employer's Quarterly Report for the quarter ending March 31, 2002 confirmed the employment of the beneficiary and one other individual.

The director determined that the petitioner had not established that the beneficiary had been or would be acting in a primarily managerial or executive capacity.

On appeal, the petitioner acknowledges that it has employed only two persons since it began operations. The petitioner asserts that the beneficiary is primarily an executive and manager and has also "applied his executive duties to the lower level employees and the operational activities of the company as well as to the customer and public relations and lobbying for further expansion in the overall sales of the company."

As observed above, the regulations allow the petitioner one year to establish a new office. There is no provision in CIS regulations 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 present matter, the petitioner has acknowledged that the beneficiary continues to supervise the lower level employee and is providing customer and public relations. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the

petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The petitioner's assertion that the beneficiary is primarily an executive or manager is without merit. As noted above, the petitioner acknowledges that the beneficiary continues to perform non-managerial and non-executive duties but fails to document what proportion of the beneficiary's duties would be managerial and executive and what proportion would be non-managerial and non-executive. For this reason, the AAO cannot conclude that the beneficiary is primarily performing the duties of a manager or executive. *See e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). Further, the petitioner fails to provide evidence that it has sufficient employees to relieve the beneficiary from performing the petitioner's operational and administrative tasks. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* 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).

Based on the evidence presented, the AAO cannot conclude that the beneficiary has been or would be employed in the U.S. entity in a primarily managerial or executive capacity.

For the foregoing reasons, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary had been employed by the overseas entity in a managerial or executive capacity as defined at section 101(a)(44) of the Act. The petitioner provided a vague and nonspecific job description of the beneficiary's overseas duties that fails to demonstrate what the beneficiary did on a day-to-day basis. For example, the petitioner stated that the beneficiary's duties included "overall in charge of a large and established apparel import, manufacturing, and distribution company," and "direct finance, marketing, manufacturing, import, and distribution functions, supervise managers and assistant managers." The petitioner did not, however, provide evidence of employees who actually performed the foreign entity's various functions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). For this additional reason, the appeal will be dismissed.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.