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

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: LIN 03 079 51859 Office: TEXAS SERVICE CENTER Date: AUG 19 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, 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 claims to be a subsidiary of Graniti Marmi Pietri, S.P.A., located in Italy, and states that it is a wholesaler and distributor of granite, marble, limestone, and other such products. It seeks authorization to employ the beneficiary temporarily in the United States as its import and export manager for an initial period of one year at a salary of $44,760 per year. The director determined that the petitioner failed to establish that the U.S. and foreign entities have a qualifying relationship and that the beneficiary's proposed employment in the United States would be in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state 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.

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

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

Branch means an operation division or office of the same organization housed in a different location.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, in pertinent part:

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.

In support of the petition, the petitioner submitted a letter titled "Consent of the Board of Directors," dated December 5, 2002, indicating that the foreign entity owns 1000 shares of the petitioner's stock and that Californian S.A. owns the other 500 shares of the total 1500 shares that were issued.

The record shows that on January 16, 2003 the director issued a request for additional evidence. Namely, the director instructed the petitioner to submit evidence establishing that the foreign and U.S. entities share common ownership and control.

The petitioner responded with two stock certificates confirming the Consent of the Board of Directors. As cited by the director in the denial, neither of the stock certificates was dated or signed by the president. The petitioner did not submit any other evidence regarding the issue of a qualifying relationship.

On March 10, 2003 the director denied the petition basing the decision, in part, on the petitioner's inability to submit sufficient evidence to establish that it has a qualifying relationship with the claimed foreign entity.

On appeal, the petitioner submits a new stock certificate, dated January 1, 2003, issuing 22,000 shares of its stock to the foreign entity. The petitioner also submitted the previously submitted stock certificate, which issued 1000 of its shares to the foreign entity. The resubmitted stock certificate contained the words "Void-Cancel-Void." However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Furthermore, 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). In the instant case, counsel offers no explanation, nor does he even acknowledge the significant alteration of facts regarding the foreign entity's ownership of the petitioner's stock.

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 immigrant 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)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). 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, supra* at 595.

On review, the record lacks evidence to demonstrate that a qualifying relationship exists between the U.S. petitioner and the beneficiary's foreign employer. For this initial reason the petition cannot be approved.

The other issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

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-

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 support of the petition, the petitioner provided a brief description of the beneficiary's proposed job duties in the United States. As the director incorporated the petitioner's description in the denial, the AAO need not repeat it in the instant proceeding.

After reviewing the evidence submitted, the director found that the petitioner did not submit sufficient evidence regarding the beneficiary's proposed job duties and the petitioner's organizational hierarchy. As such, the director's request for additional evidence instructed the petitioner to provide a copy of its organizational chart showing the beneficiary's proposed position

in relation to others in the company. The petitioner was asked to identify its seven claimed employees by name and job titles. The petitioner was also instructed to submit a description of job duties for each of its employees, including a specific description for the beneficiary.

The petitioner's response included an "operations flow chart" in which the petitioner named a general manager at the top of the organization's hierarchy. Two assistant managers, one of whom is the beneficiary, are illustrated directly under the general manager. The two assistant managers directly oversee the work of a single foreman and two office employees whose specific job titles the petitioner did not provide. The chart lists the names of another five employees in the position of "shop & driver." All five employees are supervised by the foreman. The petitioner's general manager also provided the following additional description of the beneficiary's proposed job duties:

> [The beneficiary's] actual role in the company transcends the line between executive and manager as does mine. As we are in our infancy, as far as development, each executive has multiple roles.
>
> [The beneficiary's] ability to speak several different languages has proved to be a valuable tool in the procurement of many different granites and marbles . . . . His expertise in the identification of the source and types of materials essential to our continued growth makes him a key player in the progress of [the petitioner]. He also has to serve in the capacity of sales and management of the employees here at the A.P that are responsible for unloading, loading and shipments of our materials in Michigan.
>
> Our goal is to expand our offerings so that we have the best and most extensive collection of granite, marble limestone and slate. Again, this is where we need the expert knowledge base of [the beneficiary]. His extensive work . . . make [sic] him in-valuable [sic] as a key part of the determination of what stones are desired in the U.S., where we can find them, and who we need to contact in order to purchase them. The future expansion of [the petitioner] is dependent upon his expertise. . . .

It is noted that the petitioner failed to provide job descriptions for any of the other employees listed in the petitioner's organizational flow chart.

On March 10, 2003, the director denied the petition concluding that the beneficiary would primarily act as a first-line supervisor, supervising non-professional and non-managerial employees.

On appeal, counsel provides a detailed description of the beneficiary's overseas day-to-day job duties, which suggest that the beneficiary used his discretionary authority to oversee the work of managerial personnel in a number of the company's many departments. Therefore, the AAO is satisfied that the beneficiary's job duties abroad were primarily of a managerial nature. In regard to the beneficiary's proposed job duties with the U.S. petitioner, counsel provides the following additional description:

> In his position as Manager [the beneficiary] will undertake a critical function on behalf of [the petitioner]—he will run the entire Atlanta operation. This position

> entails overseeing sales and projects valued in the millions, supervising a staff of managers and their team members, and coordinating affairs between G.M.P., the Italian parent company, and the Atlanta office. As Manager of the Atlanta operation of [the petitioner], [the beneficiary] will also have sole responsibility in selecting and procuring granite, marble, limestone, and other natural stone material for both the Michigan location and the Atlanta location. [The beneficiary] is expected to assume his duty based upon his expertise and experience in the area of varieties, quality and source of natural stones all of which are critical to the success of [the petitioner]. In short, [the petitioner's] continued success and growth is dependent upon the presence of [the beneficiary] in the United States.

Although counsel's description stresses the beneficiary's knowledge and expertise in the relevant industry, the record does not support counsel's overall suggestion that the beneficiary would manage personnel and the petitioner's essential function. Based on the personnel structure at the time the petition was filed, the petitioner's only managerial employees consisted of a general manager to whom the beneficiary would report and an assistant manager who would have the same job title, and presumably the same level of authority, as the beneficiary himself. The petitioner's organizational structure lacked a third managerial tier for the beneficiary to manage. Based on the flow chart submitted in response to the request for additional evidence, the petitioner would be supervising a foreman and two office workers whose exact job titles and job duties were not disclosed. As such, the AAO cannot conclude that the beneficiary would be supervising a staff of professional, managerial, or supervisory personnel.

While supervision of personnel is not essential in the case of a beneficiary who would oversee an essential function, the lack of a specific description of the beneficiary's proposed job duties precludes the AAO from being able to ascertain what, exactly the beneficiary would be doing on a daily basis. 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). Furthermore, in order to establish that the beneficiary would be managing an essential function, the petitioner must provide evidence that the beneficiary himself would not be performing the essential function, since 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, supra.*

In the instant case, the petitioner's general manager admitted in his statement, dated February 13, 2002, that the petitioner is still in its early stages of development and further stated that the beneficiary would be called upon to perform the sales function. However, the record clearly states that the petitioner was established in 1997 and has been doing business for longer than one year. Therefore it can no longer be classified as a "new office." *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). While it is foreseeable that during a petitioner's first year of doing business a manager or executive may be called upon to engage in a number of non-qualifying duties, 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 in CIS regulations that allows for an extension of this one-year period. In the instant matter, the petitioner was established not one, but several years ago. As such, the petitioner cannot rely on its early stage of development as

justification for requiring the beneficiary to perform primarily non-qualifying duties. While the reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.