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U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: SRC 01 218 53404 Office: NEBRASKA SERVICE CENTER Date: DEC 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(1)(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

DISCUSSION: The Director, Nebraska Service Center, denied the petition for a nonimmigrant visa. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the previous decision of the AAO will be affirmed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 Texas that is engaged in operation of a restaurant. The petitioner claims that it is the affiliate of [redacted] located in [redacted] Pakistan. The petitioner seeks authorization to open a new office in the United States and to employ the beneficiary as its vice president.

The director determined that the petitioner had not established that the beneficiary qualified as a manager or executive. Furthermore, the director denied the petition because the foreign entity failed to provide evidence of an investment adequate to support a new office in the United States.

The petitioner disputed the director's findings on appeal, asserting that the beneficiary submitted sufficient evidence to establish that the beneficiary has been and would be employed in a managerial or executive capacity. Further, the petitioner claimed that the director misstated the amount of funds available for the new office, and that the petitioner had sufficient investment to warrant approval.

The AAO affirmed the director's decision on appeal, noting that the petitioner's duties in Pakistan were those of a first-line supervisor of non-professional employees and therefore not in a qualifying capacity under section 101(a)(44)(A) of the Act. In addition, the AAO found that the petitioner had not established the proposed nature of the office, the scope of the entity, the organizational structure, or its financial goals as required under 8 C.F.R. § 214.2(l)(2)(v)(C), and further noted that the petitioner had not submitted sufficient evidence to demonstrate that the U.S. entity is a qualifying entity under 8 C.F.R. § 214.2(l)(1)(ii)(G).

On motion, counsel submits a brief and additional evidence to address the grounds of the director's denial and the findings of the AAO. Counsel asserts that the petitioner has been successfully operating its restaurant under the beneficiary's management, employs six people as of September 2003, and achieved net income of over $37,000 in 2002, which counsel claims is more than sufficient to support an L-1 employee. In support of these assertions, counsel submits the petitioner's Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation for 2002; Illinois Department of Revenue 2002 Form IL-1120-ST, Small Business Corporation Replacement Tax Return; pay stubs for the period May 1, 2003 to August 31, 2003 for the petitioner's six claimed employees; Forms 941, Employer's quarterly Federal Tax Return for the last two quarters of 2002 and the first two quarters of 2003; and Forms ST-1, Illinois Sales and Use Tax Returns for the petitioner's restaurant, dated April 2002 to July 2003. In addition, counsel asserts that the petitioner is in the process of expanding its interests into other businesses and is negotiating the purchase of another business.

Counsel also addresses the issue of the qualifying relationship between the foreign and U.S. entity raised by the AAO, asserting that the beneficiary is "a principal" of the foreign entity and that he owns 60% of the

shares of the petitioner. Counsel submits various tax documents from Pakistan as evidence of the foreign company's ownership, all of which were submitted with the initial petition. Counsel further asserts that the beneficiary's position with the foreign entity was executive in nature and that his role in the U.S. is "in no way supervisory in nature" as he is in the U.S. to expand the foreign entity into different business areas. Finally, counsel refers to two previous AAO decisions as supportive of the petitioner's assertion that the beneficiary qualifies for classification as a nonimmigrant under section 101(a)(44)(A) of the Act.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate 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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petition shall submit evidence that:

> (A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three-year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority of the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraph (l)(1)(ii)(B) or (C) of this section, supported by the information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity

The first issue in the present matter is whether the beneficiary served primarily in a managerial or executive capacity with the claimed foreign affiliate in Pakistan for at least one continuous year in the three years prior to the petitioner's submission of the instant petition.

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 fire 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 the higher level executives, the board of directors, or stockholders of the organization.

The AAO cited in detail the description of the beneficiary's duties as submitted with the initial petition in its decision. The description is therefore part of the record and will not be repeated here. On appeal, the petitioner asserted that the beneficiary "has been employed in the Executive capacity, has powers to manage, establish goals and polices, exercise wide latitude in discretionary decision-making and receives nominal supervision or direction for higher executives. He also has the power to hire and fire and has discretionary powers over the day-to-day operations of the business." On motion, counsel asserts that the beneficiary's position with the foreign entity was "very much executive in nature" and that the beneficiary was "in charge of overall operations, including negotiating contracts with new customers, and overseeing all day to day operations and employees. Being a principal it was his duty to direct and guide the organization." Counsel also notes that the beneficiary holds a Bachelor of Commerce degree from the University of Karachi and submits a copy of the diploma as further evidence of his qualifications as an executive.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's job 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 in an executive or managerial capacity. *Id.*

Counsel has provided no additional evidence on motion that would persuasively demonstrate that the beneficiary has been employed primarily in a managerial or executive capacity with the foreign entity. The description of duties provided on motion is more vague and nonspecific than the description provided with the initial petition and provides no indication of the actual duties performed by the beneficiary on a day-to-day 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).

The more specific description of the beneficiary's responsibilities in Pakistan, submitted with the initial petition, indicated that the beneficiary primarily develops leads for future work which, by definition, qualifies as performing a task necessary to produce a product. An employee who primarily performs the tasks

necessary to produce a product or 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 current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial operational duties. The petitioner's various descriptions of the beneficiary's job duties do not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The AAO notes that the record contains no organizational chart for the foreign entity, nor does it include the names, job titles, job descriptions or educational background for the four employees who were claimed to be the beneficiary's subordinates with the foreign entity. With no information regarding the foreign entity's organizational structure, there is no context in which to review the beneficiary's duties. Since it is claimed that the beneficiary's duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional or managerial. *See* § 101(a)(44)(A)(ii) of the Act. As no additional documentation or information has been provided on motion other than the assertions of counsel, the AAO cannot conclude that the beneficiary was employed primarily in a qualifying managerial or executive capacity with the foreign entity. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N, Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is noted that on motion, counsel refers to an unpublished decision involving an employee of the Irish Dairy Board. In the unpublished decision, the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the Irish Dairy Board matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although another unpublished decision was referenced in counsel's brief, it is also not binding for the reasons set forth above.

Upon careful review of the record, AAO cannot determine that the beneficiary has been employed primarily in a qualifying executive or managerial capacity with the foreign entity.

The AAO next examines the question of whether the foreign entity has invested adequately to support a new office in the United States. Under the regulations at 8 C.F.R. § 214.2(1)(3)(v)(C), a petitioner may establish an adequate investment by submitting evidence to establish that:

> The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position . . . supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and the financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

In its decision, the AAO concluded that the petitioner had not met any of the subsection 214.2(l)(3)(v)(C)(2) requirements based on its failure to provide sufficient documentary evidence to establish an adequate investment in the U.S. entity.

On motion, counsel requests reconsideration on the grounds that the petitioner has been successfully operating the restaurant since its inception and that it achieved net income in excess of $37,000 in 2002, which it claims is "more than enough to both support itself and a [sic] its L-1 employee." Counsel submits the 2002 IRS Form 1120S for the petitioner, which shows that $10,000 was paid to the beneficiary as an officer of the company. Counsel asserts that the petitioner now employs six individuals and also submits evidence of payment of Illinois Sales and Use taxes, claiming that the restaurant is "a thriving business which can and does support itself and its L-1 employee."

Upon review, the evidence submitted by the petitioner regarding the status of its operations in September 2003, two years after the filing of the initial petition, will not be considered as evidence of establishment of an adequate investment in the U.S. entity. 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 has submitted no additional evidence related to the initial investment made in the United States entity by the foreign entity. Accordingly, the AAO affirms the previous decision that, based upon the documentary evidence submitted by the petitioner at the time of filing and in response to the director's request for additional evidence, the petitioner did not meet the requirements for establishment of a new office under 8 C.F.R. § 214.2(l)(3)(v)(C).

Further, it is noted that the statements and evidence submitted by counsel on motion suggest that the beneficiary remained in the United States, obtained a Social Security Number, and assumed duties as the petitioner's president following the director's denial of the nonimmigrant visa petition and request for a change of nonimmigrant status. Section 212(a)(9)(B) of the Act states that an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General. In the case of a lawfully admitted nonimmigrant who has timely filed a non-frivolous request for a change of status and who has not been employed without authorization in the United States before or during the pendency of such application, the calculation of the period of stay is deemed to be extended for the entire period the request for a change of status is pending. *See* § 212(a)(9)(B)(iv) of the Act, *see also* memorandum of [redacted] INS Exec. Assoc. Commissioner, HQADN70/21.1.24-P, AD 00-07 (March 3, 2000) (advising Service Centers that the period of stay authorized by the Attorney General covers the 120-day tolling period described in section

212(a)(9)(B)(iv) of the Act and continues until the date the Service issues a decision). The AAO notes that the beneficiary's period of authorized stay is therefore deemed to have expired on February 22, 2002, when the director denied the I-129 petition and request for a change of status to L-1A nonimmigrant from that of a visitor under section 101(a)(15)(B) of the Act. Unless CIS directs otherwise, the filing of a motion to reopen or reconsider or of a subsequent application or petition does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv). If, as the record suggests, the beneficiary remained in the United States beyond that date and assumed the duties proposed in the initial petition, he is unlawfully present in the United States and may be subject to removal.

The final question to be examined in this proceeding is whether the U.S. entity is a qualifying organization. The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) define a qualifying organization as a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly on 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 directory or though 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.

In pertinent part, 8 C.F.R. §§ 214.2(l)(1)(ii)(I, (J), (K) and (L) define "parent," "branch," "subsidiary," and "affiliate" as:

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

* * *

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

* * *

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.

* * *

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 indicated on Form I-129 that it and the foreign entity are affiliates. The record contains copies of the petitioner's certificate of incorporation, articles of incorporation, and a document entitled "Stock Certificate Number One (1)" which certifies that the beneficiary "is the Owner of Eight Hundred (600) [sic] fully paid shares of common stock" out of the company's 1,000 shares. The record also includes various documents regarding the foreign entity, including a Certificate of Registration issued in December 2000, two National Tax Number certificates, evidence of membership in the [redacted] and evidence that the company is registered as an importer and exporter in Pakistan. Although the issue of whether the petitioner is a qualifying entity was not raised by the director, counsel asserted on appeal that the majority (60%) of the shares of the petitioner are owned by its foreign affiliate, with 40% of the shares owned by [redacted]

On appeal, the AAO determined that the petitioner did not identify itself as one of two subsidiaries both of which are owned and controlled by the same parent or individual. Further, the petitioner offered no evidence showing that the same group of individuals own the same share or proportion of shares in the foreign and U.S. entities. In absence of supporting documentation, the AAO determined that there was insufficient evidence to find a qualifying relationship between the foreign and United States entities.

On motion, counsel states that there was "miscommunication" regarding whether the two organizations were qualifying organizations and submits many of the same documents for the foreign entity that were submitted with the initial petition. Counsel states that the National Tax Number Certificate shows the name of the foreign entity and lists the beneficiary as one of its principals, and that other documents submitted show the proprietor of the foreign entity as the beneficiary. Counsel further asserts that the beneficiary is the "principal" with the petitioner and that the two organizations are "under the same ownership," with 60% of the petitioner's stock held by the beneficiary.

Upon review, the assertions made by counsel on motion are not persuasive. 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 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 each 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, CIS is unable to determine the elements of ownership and control.

Upon careful review of the record, the AAO finds no stock certificates or any other documentary evidence related to the ownership of the foreign entity, other than an assertion by counsel that the beneficiary is one of its "principals" and that the foreign and United States entities share the same ownership. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89, n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Without documentation evidencing the ownership of the foreign company, it is not possible to conclude that there is a qualifying relationship between the petitioner and its claimed affiliate.

Further, the AAO notes that the evidence regarding ownership of the U.S. entity is inconsistent. In the initial petition, the petitioner stated that the petitioner is "more than 51%" owned by the foreign entity, and submitted a stock certificate that shows that the beneficiary owns either 600 or 800 of the company's 1,000 shares. On appeal, counsel asserted that 60% of the shares are owned by the foreign entity, and on motion, counsel states that 60% of the petitioner's shares are owned by the beneficiary. On motion, counsel also submits the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any non-resident alien shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a foreign corporation owns it in any part. The petitioner's Schedule K-1, which is appended to the 2002 Form 1120S, reveals that the beneficiary is the sole shareholder. This conflicting information has not been resolved. 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, 591-2 (BIA 1988).

Although not addressed in the previous decision of the AAO, as it now appears that the beneficiary is also the sole owner of the company, the record does not contain proof that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States pursuant to 8 C.F.R. 214.2(l)(3)(vii). For this additional reason, the petition may not be approved.

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).

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The decision of the AAO dated August 18, 2003, is affirmed.