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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 02 271 52493 Office: VERMONT SERVICE CENTER Date: JUL 12 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

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 AAO will dismiss the appeal.

The petitioner claims to be engaged in the business of trading tractor and auto parts. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as executive manager. The director determined that the petitioner had not established that it has a qualifying relationship with a foreign entity or that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits additional documentation to support 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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) 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 U.S. petitioner was incorporated in 2001 and claims to be the wholly owned subsidiary of Punjab Tractors, located in India. The initial petition was approved and was valid from September 5, 2001 to September 4, 2002, in order to open the new office. The petitioner seeks to extend the petition's validity and the beneficiary's stay for three years at an annual salary of $42,000. The first issue in this proceeding is whether the petitioner has a qualifying relationship with 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.

Although the petitioner claimed in the petition and in the supporting statement that it is wholly owned by a foreign company, its 2001 tax return indicated that the beneficiary personally owns 100 percent of the petitioner's shares. In an effort to resolve this inconsistency, the director issued a request for additional evidence on September 5, 2002 instructing the petitioner to submit evidence to establish that it has a qualifying relationship with a foreign entity.

In response to the request, the petitioner stated that the beneficiary is the owner of the foreign entity and "that's is [sic] the reason that 100 percent shares have been mentioned as of [the beneficiary]." The

petitioner provided no additional evidence or information reconciling the two distinct claims regarding its ownership. Furthermore, the AAO notes that the petitioner failed to submit Form 5472, an Information Return of a corporation that is at least 25 percent foreign-owned, as required in Schedule K, Item 7(c) of the Form 1120 corporate tax return.

The director denied the petition, noting that the petitioner had not previously indicated that the beneficiary was proprietor or managing director of the foreign entity. The director's first ground for denial was based on the conclusion that the petitioner failed to submit sufficient evidence to establish that it has a qualifying relationship with a foreign entity.

On appeal, counsel submits a statement asserting that based on audits performed by accountants "there appears to be absolutely no doubt that [the petitioner] is the Subsidiary of [the foreign entity]." However, despite counsel's assertion, the findings of an accounting firm are no different than counsel's own assertion in the sense that both are third parties whose claims are mere extensions of the petitioner's claim. A third party attestation, whether that of counsel or that of an accounting firm, does not, in and of itself, constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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). Rather than submitting evidence, counsel merely offers an explanation that the beneficiary owns 100 percent of the foreign entity and, therefore, effectively owns the U.S. company. However, 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). In the instant case such documentary evidence has not been produced; nor has the petitioner explained why, if the petitioner is entirely owned by a foreign person or entity, it did not file a Form 5472, which would have informed the Internal Revenue Service of the foreign ownership.

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. In the instant matter, the petitioner has not submitted sufficient evidence to establish that the foreign entity and the U.S. petitioner are commonly owned and controlled. As such, the petitioner has failed to establish that it has a qualifying relationship with a foreign entity. 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 the following description of the beneficiary's past and proposed job duties:

[The beneficiary] has been continuously working with the parent PT since 1963 in the capacity as Marketing Manager sales and marketing of their spare parts. His duties were primarily concerned with all of [the petitioner's] purchasing, marketing. This included, but is not limited to directing and managing the marketing and purchase function, negotiating prices and quality with suppliers of raw materials, and any new purchase and supervising that the main purchase of PT, Market is always sufficiently stocked. [The beneficiary] is responsible for hiring, training and supervising of the employees of PT. It is within this position, where the beneficiary gained extensive general business experience and knowledge

> within the area of management and control of an expanding business operation. The position is an "Executive Position" with the Beneficiary keeping the other partners informed of the developments in the Beneficiary's area of operations. [sic]
>
> The Beneficiary will be required to run the day-to-day management, marketing, and administration as well as client negotiation for the wholly owned subsidiary . . . .

The director determined that the above description of duties was insufficient and instructed the petitioner to submit a more comprehensive description. The petitioner was also asked to provide the educational credentials and complete position descriptions for all of the petitioner's proposed employees.

The petitioner's response included the following job description for the beneficiary:

> Manage the US entity, all departments like sales, purchases and marketing etc. Manages the whole function and component of the organization. Supervises and controls the work of all the junior staff. Manage all departments. Exercises wide latitude in discretionary powers to hire or fire the new staff as per the requirement of smooth running of US entity. Besides this the beneficiary is coordinating with local importer companies in order to execute projects. Only a person of managerial capacity can perform these duties. The beneficiary is responsible for executing sales, purchase and marketing and is also responsible for getting that delivery of products executed in time through local clearing companies. The beneficiary looks after the wholly owned [petitioner]. The Beneficiary has hired four employees for sales, purchases and marketing arrangements the beneficiary has done tremendous business in this very short period. This is the time when the beneficiary can increase the business, if he will not be able to get this extension, he will loose [sic] his customers and besides his business. It is within this position, where the beneficiary gained extensive general business experience and knowledge within the area of management and control of an expanding business operation.

The petitioner also stated that it has hired three employees, one to oversee the sales department; another to oversee "office compilation," customer calls, and purchases; and a third to work as the business coordinator. The petitioner provided no explanation as to what is entailed in the oversight of the sales department or business coordination.

The director subsequently denied the petition, stating that the second ground for denial was the petitioner's failure to submit sufficient evidence to establish that the beneficiary would primarily perform managerial or executive duties. The director noted that due to the petitioner's failure to provide job descriptions for the beneficiary's subordinates, CIS cannot conclude that the petitioner has sufficient staffing to relieve the beneficiary from performing non-qualifying duties.

On appeal, the petitioner submits a statement claiming that the beneficiary's "in-depth knowledge of the processes, procedures and complexities" of the industry in which the petitioner is involved qualifies him for classification as a manager or executive. However, the extent of the beneficiary's knowledge and experience in the industry of auto parts, though clearly beneficial to the petitioner, is not a sufficient indicator for determining whether the beneficiary qualifies for status as an L-1A manager or executive. Rather, 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(l)(3)(ii). 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). In the instant case, the petitioner claims that the beneficiary manages departments, functions, and personnel, which suggest that the beneficiary is acting in the role of both manager and executive. However, a beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. The petitioner has not provided sufficient information about the beneficiary's job to lead the AAO to the conclusion that he performs primarily managerial or executive tasks. To the contrary, the petitioner indicates in response to the director's request for evidence that the beneficiary "is responsible for executing sales, purchase and marketing and is also responsible for getting that delivery of products executed in time through local clearing companies." It is entirely unclear what is meant by "is responsible for" these tasks. If the beneficiary is actually performing sales and marketing duties, which are non-qualifying tasks, then the beneficiary cannot be deemed a manager or executive. If, on the other hand, the beneficiary supervises others who perform these non-qualifying tasks the AAO would need more information about the actual job duties of such subordinates to determine whether they are managerial, supervisory, or professional employees. In either case, the petitioner has failed to provide the details necessary to determine what the beneficiary would actually be doing and how the petitioner's support staff would relieve the beneficiary from having to perform non-qualifying duties. It is noted that 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). Although the petitioner submits "expert comments" from university professors who claim that the beneficiary's is managerial in nature, such third party attestations are not considered sufficient evidence that the beneficiary's duties are primarily managerial. *See Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez, supra.*

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that the beneficiary will be relieved from performing non-qualifying duties. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. 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.