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U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: WAC 02 074 50361 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 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, California 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 is a new U.S. office engaged in the sale of garments, fabrics, and other commodities from Pakistan. The petitioner seeks to temporarily employ the beneficiary as president of marketing and sales, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding the petitioner did not establish that: (1) a qualifying relationship exists between the U.S. and foreign entities; and (2) the petitioning organization has been doing business in the United States.

On appeal, counsel submits a letter stating that the U.S. company is a wholly owned subsidiary of the beneficiary's foreign employer. Counsel also asserts that following the receipt of a second request for evidence from the director, the petitioner was not given the specified period to respond. Counsel therefore submits on appeal additional evidence pertaining to the foreign entity's ownership of the U.S. company, and documentation regarding the petitioner doing business in the United States.

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)(3) further 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.

Moreover, pursuant to the regulation at 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 be employed in a new office in the United States, the petitioner 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 involved executive or managerial authority over the new operation;

(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 paragraphs (l)(1)(ii)(B) or (C) of this section, supported by 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 this proceeding is whether a qualifying relationship exists between the U.S. and foreign 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 in both the petition and attached documentation that the U.S. entity is a wholly owned subsidiary of the beneficiary's foreign employer. As proof of the parent-subsidiary relationship, the petitioner provided the minutes from the first shareholders meeting of the U.S. entity, in which the U.S. corporation authorized the sale and issuance of 100,000 shares of stock to the beneficiary's foreign employer in consideration for $3,000.00. The petitioner also submitted a stock certificate dated November 21, 2001, naming the beneficiary's foreign employer as the registered holder of 100,000 shares of stock in the U.S. company, and an additional document titled "Certificate" verifying the same.

In a request for evidence dated February 5, 2002, the director asked that the petitioner submit the following documentation establishing a qualifying relationship between the two entities: (1) evidence that the foreign company paid for stock ownership in the U.S. company, including wire transfers, cancelled checks, and deposit receipts; (2) the U.S. company's bank statements for the previous year; and, (3) letters from the financial institutions in which the petitioner has accounts, identifying the date the account was opened, and the account's current status and balance. With regard to payment by the foreign company for stock ownership in the petitioning organization, the director stated that the petitioner should clearly identify from where the money originated. The director noted that for funds not originating with the foreign company, the petitioner should explain the source of the funds, its affiliation to the foreign and U.S. companies, and the reason the money was transferred from a different source.

An additional request for evidence was issued by the director on May 17, 2002. The director's second request was the same as the previous, and asked the petitioner to submit the same documentation. The petitioner submitted its response on May 22, 2002, and included: (1) a copy of a Bank of America wire transfer dated January 16, 2002, reflecting a transfer of $11,431.00 from a "Mr. [redacted] to the beneficiary; (2) a bank letter verifying the existence of a Bank of America checking account, opened February 2002; (3) bank statements for January through March 2002, reflecting the U.S. company's ending bank balance on March 21, 2002 of $2,100.33; and, (4) a letter from the beneficiary's foreign employer "confirm[ing] that payment was made for us [sic] stock by many transfers to [the beneficiary's] account."

In his decision, the director concluded that the record lacked evidence to establish a qualifying relationship between the foreign and U.S. entities. The director acknowledged the copy of a wire transfer, which identified the source of the transferred funds as "Mr. [redacted] yet noted that "[t]he record contains no information as to who Mr [redacted], or what position he has with the foreign or U.S. entity." The director determined that the documentation was not sufficient to demonstrate ownership and control of the petitioning

organization, or that the foreign company has in fact paid for the U.S. entity. The director consequently concluded that the U.S. company was not a subsidiary of the beneficiary's foreign employer. The director also reviewed the record for the existence of an affiliate relationship, but determined the evidence was insufficient.

On appeal, counsel states that the U.S. entity is a subsidiary of the beneficiary's foreign employer, and submits a letter from the petitioner claiming that the foreign company owns and controls the U.S. entity. In the letter, the petitioner states that with regard to the wire transfer, the originator, Mr. [redacted] purchased goods from the foreign company worth $11,431.00. The petitioner explains that Mr [redacted] was asked by the foreign company to send his payment directly to the beneficiary in the United States, who "was instructed by [the foreign company] to use these funds primarily to buy stock in [the petitioning organization]."

The petitioner also asserts in its letter on appeal that it was not given an opportunity to respond to the director's second request for evidence issued on June 5, 2002. The petitioner states that the director requested proof of stock purchase, and subsequently issued a decision prior to the petitioner's response. The petitioner claims that the evidence clearly demonstrates that the beneficiary's foreign employer wholly owns and controls the U.S. company.

On review, the record does not conclusively demonstrate that a qualifying relationship exists between the U.S. and foreign entities. The AAO will adjudicate the appeal based on the record of proceeding before the director. The petitioner was put on notice of required evidence pertaining to the foreign company's stock ownership in the U.S. corporation, and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 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 regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

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,* 19 I&N Dec. at 365. 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 record is insufficient to substantiate the petitioner's claim of a parent-subsidiary relationship. The petitioner submitted a stock certificate and the minutes from the shareholders meeting as evidence of a qualifying relationship. The director subsequently requested that the petitioner provide additional evidence, including bank statements and a detailed explanation of the consideration provided by the foreign company in exchange for stock ownership in the petitioning entity. The director specifically noted that if the funds originated from a source other than the foreign company, the petitioner should identify the source and its relationship to the foreign company, and clarify the purpose of such a transfer. There is evidence in the record that on May 22, 2002, the petitioner responded to the director's request, and submitted a copy of a January 2002 wire transfer. Additionally, the beneficiary's foreign employer provided a letter stating that payment for the U.S. company's stock was through many transfers of money to the beneficiary. The petitioner, however, failed to indicate that the funds were transferred from an unrelated third party, nor did the petitioner explain the source's relationship to the foreign company. Absent additional explanation, the AAO cannot determine that the foreign entity furnished any consideration in exchange for stock ownership in the U.S. organization. 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). Also, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition, even if the petitioner had identified the existence of a wire transfer from an unrelated third party, the record does not clarify the discrepancy between the time the stock certificate was issued, November 21, 2001, and the date on which the wire transfer took place, January 16, 2002. The petitioner neglected to explain how a transfer of funds in January 2002 could constitute consideration for the receipt of stock two months earlier. 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).

Counsel claims on appeal that the director did not give the petitioner an opportunity to respond to the second request for additional evidence. It is unclear from the record whether the documentation submitted by the petitioner on May 22, 2002 was in response to the director's first request for evidence, or his second request. It should be noted that both requests contained the same information, and asked the petitioner to submit the same documentation. If the petitioner was responding to the director's first request, which required a response by April 30, 2002, the untimely response should have been considered an abandonment of the petition pursuant to the regulation at 8 C.F.R. § 103.2(b)(13), and the petition would be denied. It appears from the record, however, that the director considered the petitioner's May 22, 2002 response a timely response to his second request. Therefore, contrary to counsel's assertions, the petitioner was given an opportunity to submit additional documentation. It is likewise to the petitioner's advantage that this issue be

determined as such, otherwise, as addressed above, the petitioner's response would be considered untimely, and the petition denied. *Id.*

Based on the evidence submitted, the petitioner has not established a qualifying relationship between the U.S. and foreign entities. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioning organization has been doing business in the United States.

The term "doing business" is defined in the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) 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.

The petitioner submitted an office lease reflecting the use of premises identified as [redacted] as a general office from December 15, 2001 through December 14, 2002.

In a request for evidence, the director asked that the petitioner submit: (1) the U.S. company's bank statements for the previous year; (2) letters from the financial institutions in which the petitioner has accounts, identifying the date the account was opened, and the account's current status and balance; and (3) color photographs of the interior and exterior of the U.S. office premises, reflecting all factory, warehouse, and office spaces with equipment, merchandise, and products, and any buildings on which company signs are displayed. In response, the petitioner provided a bank letter verifying the existence of a Bank of America checking account, opened in February 2002, bank statements for January through March 2002, reflecting the U.S. company's ending bank balance on March 21, 2002 of $2,100.33, and a business tax certificate indicating that the petitioner is entitled to operate a business in the city of Fremont, California. The petitioner also submitted three pages of photocopied pictures, which identified the petitioner's office address as [redacted]

In his decision, the director noted that the petitioner submitted one lease, which permits the use of the premises as a general office. The director stated that the petitioner did not "demonstrate that it will be operating its wholesale and retail business from a different location." The director therefore concluded that the U.S. entity has not been doing business.

On appeal, the petitioner explains that the petitioning organization leased two premises, one that is being used as an office for sales and marketing, and the other as a retail outlet. The petitioner submits a second lease entered into on January 16, 2002, for use of premises located at [redacted] as "general retail and satellite dish sale/service and installation."

On review, as a new U.S. office, the petitioner need not establish that it *has been* doing business in the United States. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2), which addresses "doing business," requires that the foreign corporation *is or will be* doing business as an employer in the United States. Therefore, the director's finding that the petitioner has not been doing business will be withdrawn.

A more appropriate issue is whether the beneficiary *will be* doing business in the United States as a wholesaler and retailer of Pakistani garments, fabrics, and goods. The second lease submitted by the petitioner on appeal indicates that the premises would be used as "general retail and satellite dish sale/service and installation." There is no indication in the record that the petitioning organization is involved or will be engaged in the sale, service or installation of satellite dishes. 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. at 591-92.

An additional related issue not considered by the director is whether the petitioner, as a new U.S. office, submitted evidence establishing that sufficient physical premises to house the new office have been secured. *See* 8 C.F.R. § 214.2(l)(3)(v). The record contains several inconsistencies regarding the location of the petitioner's business, and the use of the two leased premises. The lease submitted with the petition identifies the location of the office in Newark, California; the photographs submitted in response to the director's request, however, identify office premises in Fremont, California. The petitioner neglected to previously explain for the director the discrepancy in the two office addresses, nor did the petitioner submit the second office lease, which was entered into by the petitioner in January 2002 and was available to the petitioner at the time of its response to the director's request. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

Another issue not addressed by the director is the capacity in which the beneficiary would be employed in the United States. The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) provides that in order to qualify as an intracompany transferee, a beneficiary must be seeking to enter the U.S. temporarily to render his or her services in a capacity that is managerial, executive, or involves specialized capacity. The petitioner indicated on the petition that it sought classification of the beneficiary as an L-1A manager or executive, and as an L-1B specialized knowledge. In an accompanying letter, counsel requested classification of the beneficiary "as an L1A non-immigrant worker, to fill a position in the U.S. requiring specialized knowledge." The petitioner also stated that it requires the "specialized knowledge and skills" of the beneficiary in the United States. The petitioner does not clarify whether the beneficiary is seeking classification in the L-1A manager/executive subcategory, or in the L-1B specialized knowledge subcategory. 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. at 591-92. The petitioner has not submitted additional documentation to overcome this burden.

For these additional reasons, 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.