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

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 081 50252 Office: TEXAS SERVICE CENTER Date: JUN 23 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner claims to be engaged in retail, investment, and trade. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity. On appeal, counsel disputes the director's findings and submits a brief and additional evidence 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 states that it was established in 2000 and, according to the Supplement to Form I-129, claims to be a subsidiary of M/s Mayura Stone Crusher, located in India. The initial petition was approved and was valid from January 2001 to January 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 $30,000.

The 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 submitted the following description of the beneficiary's duties:

Ultimately, it will be [the beneficiary's] responsibility to establish NEI on a sound financial footing. He will recruit and train the staff and have hiring and firing authority over them. Additionally, he will use his marketing skills to develop and execute the company's marketing strategies, including advertising campaigns and company promotions.

On February 27, 2002 the director issued a request for additional evidence instructing the petitioner to submit a detailed description of the beneficiary's duties in the United States. The petitioner was asked to indicate who or what function the beneficiary manages and to provide various tax documents identifying each of the petitioner's employees and their salaries over the course of the year prior to filing the petition.

The petitioner responded with the following description of the beneficiary's duties:

- He has total managerial and executive authority over the company and all of its activities and employees, including decisions regarding hiring and firing;

- He directs and formulates financial strategy to provide funding in developing and continuing the operations to maximize returns on investments; set sales and cost targets for managers and monitor progress;

- Management Decisions: possesses all rights to execute all the managerial decisions of the Company, including purchasing goods and equipment and hiring, firing and promotion of employees; assess store mangers [sic] performance and assist with management issues;

- Supervision of the company's day-to-day operations; oversees store standards regarding food quality and customer satisfaction policy; provide support to assistants and support staff;

- Organizational Development: projects the Company's future development and executes steps to accomplish the desired growth; prepare publicity and promotional campaigns; plans business strategy and targets new business investments including decisions to expand operations.

- Company Representation: acts in the name of the Company in all kinds of business contacts and relations; coordinates with state governmental offices to ensure compliance with EPA regulations.

The petitioner also provided a number of tax documents, many of which reflected the petitioner's financial status after the petition was filed. As noted by the director, 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). As such, the AAO will not consider any documents that address the financial state of the petitioner after the petition was filed. The AAO will consider only those documents that address the relevant one-year time period. Such documents include quarterly tax returns for the third and fourth quarters of 2001, as well as the petitioner's annual tax return for 2001. Although the yearly tax return indicated that the petitioner paid $6,000 in salaries and officer compensation, the quarterly tax return for the third quarter indicated that no wages were paid from July to September 2001. Therefore, the AAO is led to the conclusion that the wages and officer compensation indicated on the yearly tax return were paid between the months of October and December of 2001.

The director reviewed the documentation discussed above and concluded that the petitioner failed to show that the beneficiary would primarily perform managerial or executive duties.

On appeal, counsel submits a brief naming two employees, aside from the beneficiary. Counsel states that one of those employees is a station manager and the other is a cashier/assistant manager, and claims that together they perform the daily tasks necessary to run the gas station and food mart. While the number of the petitioner's personnel cannot be the sole determining factor in deciding the nature of the beneficiary's duties,

it is appropriate for CIS to consider this factor in conjunction with other relevant factors, such as the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). It has been noted in the record that there are only three employees working at the gas station and food mart, both of which presumably operate longer than either employee's 40-hour weekly work schedule. Counsel claims that the beneficiary does not perform non-qualifying tasks, thereby leaving the burden of running the entire operation to the only two remaining employees. However, merely suggesting that the beneficiary does not perform non-qualifying duties because the petitioner has other employees to perform them is not enough to determine that the beneficiary is employed in a qualifying capacity. 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). In the instant case, the description of duties focuses predominantly on the beneficiary's discretionary authority. However, possessing a high degree of discretion over a business operation merely indicates that the beneficiary is at the top of the petitioner's organizational hierarchy; it does not suggest that the beneficiary's day is primarily comprised of managerial or executive tasks.

The facts of the instant case suggest that the petitioner does not have a sufficient staff to relieve the beneficiary from having to perform non-qualifying tasks, regardless of what the beneficiary's description of duties may suggest. The petitioner has previously indicated that a portion of the beneficiary's job will focus on developing marketing strategies to create advertising campaigns. However, marketing and sales related tasks do not fall under the category of qualifying duties. 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). Furthermore, the list of duties submitted in response to the request for evidence indicates that the beneficiary will oversee the work of managers and other employees. However, the record suggests that as of the date the petition was filed, the petitioner had only two employees for the beneficiary to supervise. 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, the documentary evidence indicates that the gas station was not purchased until August 2001 and fails to indicate that the petitioner has, in fact, purchased the food mart. The petitioner fails to indicate what duties the beneficiary was performing from January 2001, when the petition was approved, to August 2001, when the gas station was purchased. 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). Such specifics are missing from the record at hand.

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 fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. 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 list of duties provided by the petitioner is vague and does not convey an understanding of what the beneficiary has been and would be doing on a daily basis. Therefore, the petitioner has not demonstrated that the beneficiary will be primarily performing qualifying duties. Nor has the petitioner 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.

Beyond the decision of the director, the record contains inconsistent information regarding the petitioner's alleged qualifying relationship with a foreign entity. In the Supplement to Form I-129, the petitioner stated that the U.S. and foreign entities are owned and controlled by the same individual. The ownership breakdown indicated that the beneficiary owns 60 percent of the foreign entity and 100 percent of the U.S. entity. Accordingly, the petitioner cannot be a subsidiary of the foreign entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K). Rather, the claimed ownership breakdown indicates that the petitioner and the foreign entity may be affiliates. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L). In support of the petition, the petitioner submitted a copy of the foreign entity's Supplementary Partnership Deed, executed on October 30, 2000. It is noted that the document was not submitted in its entirety as Item Nos. 6-8 are missing. The petitioner also submitted a copy of the original partnership deed, which provided the following breakdown of the foreign entity's ownership: 1) 40 percent is owned by the beneficiary; 2) 40 percent is owned by Salim Ebrahim Khutliwala; and 3) 20 percent is owned by Tulsidas Madhubhai Patel. In response to the director's request for additional evidence, the petitioner submitted a stock certificate indicating that the beneficiary owns 1,000 shares of the petitioner's stock. However, this claimed ownership was not reflected in the petitioner's 2001 tax return, which did not indicate that the beneficiary had any ownership interest in the petitioner at all. 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). The petitioner has not provided any evidence, or even acknowledged the considerable inconsistencies in the evidence submitted.

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, supra*; *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 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. Based on the evidence submitted, the AAO concludes that the petitioner failed to show that it has a qualifying relationship with a foreign entity.

In addition, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States and abroad pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H). The record indicates that the petitioner did not purchase the gas station, its primary business, until August 2001. The petitioner has failed to submit any evidence to indicate what business the petitioner actually conducted prior to such purchase. It is noted that 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). As such, due to the additional grounds discussed in this paragraph and in the paragraphs above, this petition cannot 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.