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U.S. Citizenship and Immigration Services

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FEB 23 2005

File: SRC 03 138 52296 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN 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, 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 filed this nonimmigrant petition seeking to extend the employment of its sales manager 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 the purchase and export of used automobiles. The petitioner claims that it is the subsidiary of [redacted] Company located in Amman, Jordan. The beneficiary was initially granted a three-year period of stay and the petitioner now seeks to his status for a three-year period.

The director denied the petition concluding that: (1) the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity; (2) there is no evidence of a qualifying relationship between the petitioner and the affiliated company in Jordan; and (3) there is no evidence that the company has been doing business in the United States or abroad.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner disputes the director's findings and asserts that the evidence supports that the beneficiary serves in an executive capacity; that the petitioner is doing business in the United States and abroad and regularly purchases and ships vehicles to Jordan to be sold by the parent company; and that the company is a wholly-owned subsidiary of the Jordanian company. Counsel submits a brief and additional evidence in support of these assertions.

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 three years preceding the beneficiary's application for admission into the United States. 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) 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.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, 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 management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

In the initial petition, the petitioner submitted a letter dated March 27, 2003, which described the beneficiary's job duties as follows:

> [The beneficiary] has had a key role in the development and expansion plans of [the petitioner], and his continuing presence is essential for our expansion goals to materialize. At present, [the beneficiary] is actively seeking to ensure that [the petitioner] remain[s] competitive, maintain its workforce and provide the same level of service.

On July 1, 2003, the director requested additional evidence. Specifically, the director requested a definitive statement describing the foreign and U.S. employment of the beneficiary, including the number of employees who report directly to the beneficiary, together with a description of their job titles, duties and educational backgrounds. Alternatively, if the beneficiary does not supervise any employees, the petitioner was asked to specify what essential function is managed by the beneficiary.

In response, counsel for the petitioner submitted the following description of the beneficiary's job duties in a letter dated July 16, 2003:

> [The beneficiary] is currently the general manager [of the petitioner]. [The beneficiary] directs buyers who acts [sic] on the company's behalf at various auto auctions. Further, he utilizes his knowledge of the Middle East in conjunction with market studies to determine the need for certain types of vehicles in the Middle East. [The beneficiary] co-ordinates [sic] the transportation of cars within the U.S. and from the U.S. and is responsible for resolution of all problems and disputes. [The beneficiary] directs human resources management and exercises

> authority in regard to hiring, firing, training, delegation of assignments, promotions, and remuneration.
>
> [The beneficiary] functions largely autonomously. He is responsible for managing and directing all activities of [the petitioner]. He communicates directly with the parent company and ensures that its goals and objectives are carried out. [The beneficiary] has been extremely successful in building the U.S. subsidiary.
>
> In short [the beneficiary] exercises wide latitude and discretionary decision making in establishing the most advantageous courses of action for the successful management and direction of [the petitioner's] activities.

On September 5, 2003 the director denied the petition. The director determined that the record contained no evidence that the beneficiary's duties in the United States or abroad have been managerial or executive in nature.

On appeal, counsel for the petitioner asserts that the beneficiary clearly serves in a managerial or executive capacity and provides the following description of the beneficiary's duties as general manager:

1. Directing the trade of automobiles between Jordan and the U.S.
2. Identifying vehicles appropriate for Middle East market, based on working knowledge of regional habits and marketplace.
3. Managing the finances of the entity.
4. Setting policies and objectives of the company.
5. Managing staff (both employees and contract labor)
6. Report directly to President and Board of Directors.

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 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 either in an executive or managerial capacity. *Id.*

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner describes the beneficiary as having a "key role" in its development and expansion plans, "directing the trade of automobiles," and "directing human resources management." Yet, the petitioner has not clearly defined the beneficiary's exact role within the organization, what specific duties are involved in "directing trade" or whether these duties are primarily managerial or executive, or described its staffing levels sufficiently to convey an understanding of how much time the beneficiary could reasonably devote to human resources management issues. 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). 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 request for evidence, the director requested that the petitioner submit a definitive statement describing the foreign and U.S. employment of the beneficiary, including the number of employees reporting to the beneficiary, their job title and duties and their educational background. In response the petitioner provided no information regarding the beneficiary's foreign employment or the beneficiary's subordinates. Further, it provided a different job title for the beneficiary and a U.S. job description which largely paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "managing and directing all activities" and "exercising wide latitude and discretionary decision-making." However, conclusory assertions that merely repeat the language of the statute or regulations do no satisfy the petitioner's burden of proof. *Fedin Bros. Co. Ltd. v. Sava*, 724, F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the job description provided by the petitioner in response to the request for evidence suggests that he is directly involved in arranging transport of the vehicles purchased and shipped by the petitioner to its affiliated company in Jordan. Since the beneficiary actually coordinates transport and shipping of the product, he is performing a task necessary to provide a service or produce a product and this duty will not be considered managerial or executive in nature. 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 AAO notes that the petitioner elevated the beneficiary's job title from sales manager to general manager in response to the director's request for evidence, and on appeal has indicated new job duties, including setting policies and objectives, managing employees and contract staff, and managing the company's finances. A petitioner cannot offer a new position to the beneficiary in response to a request for evidence or on appeal, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition confirm to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The regulation states that the petitioner shall submit additional evidence the director, in his or her discretion, may deem necessary. As discussed, the petitioner did not provide the requested definitive statement regarding the beneficiary's job duties or any information regarding his subordinates. The evidence requested by the director regarding the beneficiary's job duties and the petitioner's staffing levels is critical as it would have established whether the beneficiary supervises a staff of subordinate managers, supervisors or professionals, or functions at a senior level within the company's organizational hierarchy. The petitioner claims to employ only four employees, including a president who supervises the beneficiary. The small staff size raises doubts as to whether the beneficiary has subordinates who would relieve him from performing the non-qualifying

operational and administrative tasks of the business. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition. 8 C.F.R. § 103.2(b)(14). Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what portion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 823 F.2d 175, 177 (D.C. Cir. 1991).

Given the lack of an adequate job description, the complete absence of information or documentation regarding the petitioner's staffing levels, and the combination of managerial and non-managerial duties suggested by the brief descriptions provided, the record does not demonstrate that the beneficiary will function primarily as a manager or executive. The description of the beneficiary's duties as provided in response to the direct request for additional information is vague and therefore does not clarify what the beneficiary actually does on a daily basis. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or primarily managing an essential function within the organization. Further, the record is not persuasive that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. Based on the evidence submitted, it cannot be found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The second issue in this proceeding is whether the foreign and United States entities are qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G).

The pertinent regulations at 8 C.F.R. § 214.2(l)(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:
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> > (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 indirection, 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 he 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 on individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the present matter, the petitioner claimed in its petition that the United States company is a subsidiary of the foreign company. In the letter submitted with the petition, dated March 27, 2003, it refers to the foreign company as its "affiliated company."

In her request for additional evidence, the director asked the petitioner to provide documentary evidence to establish the current ownership and control of the petitioner and the foreign employer, and evidence that the foreign employer is currently engaged in the regular, systematic and continuous provision of goods and services, including financial records, tax returns, annual reports, profit and loss statements, other accountant reports, banking records, employee rosters and evidence of business conducted.

In response, the petitioner submitted the following documents: a copy of its articles of incorporation; a copy of its stock certificate; its IRS Forms 1120, U.S. Corporation Income Tax Return for 1999, 2000 and 2001; copies of bills of lading for the U.S. and foreign companies; and copies of photographs of the Jordanian company.

In her decision, the director determined that there is no evidence that the petitioner has been doing business in the United States or abroad or that there is a qualifying relationship between the two companies. On appeal, counsel merely asserts that the petitioner is a wholly-owned subsidiary of the foreign company and submits additional documentation as evidence that the U.S. company has been doing business.

On review, the record contains inconsistencies which preclude the AAO from determining that the foreign and U.S. organizations have a qualifying relationship. The documents submitted by the petitioner as evidence of the relationship include the petitioner's Articles of Incorporation, which indicates that the petitioner is authorized to issue 1,000 shares of stock at a par value of $1.00; and a stock certificate, number one, showing that 1,000 shares of stock were issued to the claimed foreign parent company on April 1, 1998. However,

contrary to the information provided in these two documents, the petitioners' 2001 and 2002 U.S. Corporation Income Tax Returns indicate on Schedule K that the company is 100% owned by Wael Darwish. Accordingly, the petitioner is clearly not the wholly-owned subsidiary of the foreign employer as claimed by the petitioner. 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).

While it is possible that the two companies could have sufficient common ownership to meet the statutory definition of affiliates, the petitioner did not provide the evidence requested by the director with respect to the ownership of the foreign company, nor did it fully disclose all documents with respect to the U.S. company's current 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 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 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 Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

As noted above, 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. 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. In this case, the petitioner failed to comply with the director's request for documentation regarding ownership of the two companies. The 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)(8).

Based on the incomplete and inconsistent evidence in the record, the AAO cannot find that the petitioner currently has a qualifying relationship with a foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(1). Upon review of the record, the AAO does find sufficient evidence to confirm that the U.S. entity is doing business. However, without a qualifying relationship with a foreign entity, the petitioner is not a qualifying organization and cannot employ an intracompany transferee.

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.