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U.S. Citizenship and Immigration Services

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FEB 23 2005

File: LIN 03 272 50424 Office: NEBRASKA SERVICE CENTER Date:

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)

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, Nebraska 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 vice president 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 Missouri that is engaged in the import and wholesale distribution of textiles. The petitioner claims that it is the affiliate of [redacted] located in Karachi, Pakistan. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that (1) the petitioner did not establish that the United States entity had a qualifying relationship with the foreign entity, and (2) the petitioner did not establish that the beneficiary would be employed in a qualifying managerial or executive capacity under the extended petition.

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 foreign entity and United States entity are controlled by the same individual and therefore have a qualifying affiliate relationship. Counsel also asserts that the beneficiary performs only managerial and executive duties and has a sufficient subordinate staff to relieve him from performing non-managerial functions. In support of the appeal, the petitioner submits additional evidence.

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 petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(G) *Qualifying organization* means a United States or foreign firm, corporation or other legal entity which meets exactly one of the qualifying relationships in the definitions of a parent, branch, affiliate or subsidiary specified paragraph (l)(1)(ii) of this section.

* * *

(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[.]

On the supplement to the I-129 petition, submitted on September 17, 2003, the petitioner indicated that it has an affiliate relationship with the foreign company. Specifically, the petitioner stated "[t]he owners of [redacted] Industries, [redacted] own 60% of [redacted] Industries USA, Inc. See attached stock certificates." The petitioner did not attach the stock certificates or submit other supporting documentation to establish the ownership of either company; however, the petitioner did submit a letter from the foreign entity's bank which states that the Pakistani company is a sole proprietorship owned by [redacted] who is identified as the son of [redacted]

On October 24, 2003, the director requested additional evidence to establish that the petitioner and the foreign company continue to be qualifying organizations. Specifically, the director asked the petitioner to submit stock certificates as evidence of common ownership and control between the two companies. In a response received on November 19, 2003, the petitioner submitted an affidavit from the beneficiary which states that "the Adam family" owns 60 percent of the petitioner's issued and outstanding stock. The petitioner also submitted three stock certificates showing the following distribution of stock:

[redacted] - 450 shares
[redacted] 00 shares

The affidavit did not address the ownership of the foreign company. The petitioner submitted another copy of the September 4, 2003 letter from the foreign company's bank, which indicates that the company is a sole proprietorship owned by [redacted]

On December 17, 2003, the director denied the petition concluding that [redacted], the sole owner of the foreign entity, owns only 15 percent of the U.S. company, which is insufficient to establish an affiliate relationship between the two companies absent evidence that he in fact controls both companies. The director noted that the fact that [redacted] parents own stock in the U.S. company does not establish a qualifying relationship, since stock is owned individually.

On appeal, counsel states that [redacted] only recently transferred control of the foreign company to his son, [redacted] and confirms that the son is now the sole owner of the foreign company. Counsel asserts that, regardless of how the stock is distributed, [redacted] "has defacto control over his son as well as both the foreign entity and the U.S. entity." Counsel also contends that the qualifying relationship has existed as "de facto" control by combining the father's and son's stock interest in the U.S. company, which totals 60 percent, and that CIS previously recognized this "de facto" control of the United States entity when it approved the initial L-1 petition on behalf of the beneficiary. Finally, the petitioner states that [redacted] has transferred his 450 shares in the U.S. company to his son, [redacted] and submits a copy of the share certificate showing the transfer occurred on December 24, 2003. Based on these arguments and the transfer of shares, counsel contends that the petitioner has established the necessary qualifying relationship.

Upon review of the petition and supporting evidence, the petitioner has not established that it had a qualifying relationship with the foreign entity at the time the petition was filed. The regulation and case law confirm that ownership and control, whether by *de jure* or *de facto* 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 authorized by Congress, CIS is charged with the authority to make this determination based on the implementing regulations. *See generally* section 214 of the Act, 8 U.S.C. § 1184.

The record clearly indicates that the petitioning enterprise was not maintaining a qualifying affiliate relationship with the overseas company at the time the petition was filed. The evidence indicates that Mr. [redacted] was the sole owner of the foreign company. The record further indicates that three individuals own the petitioning entity in the United States, with [redacted] owning only 15 percent of the U.S. company's stock. Accordingly, the two entities are not "owned and controlled by the same parent or individual or same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity . . . ." 8 C.F.R. §§ 214.2(l)(1)(ii)(L)(1) and (2). Although counsel claims that the petitioning company is majority owned and controlled by the father and son, [redacted] this familial relationship does not constitute a qualifying relationship under the regulations.

Counsel also claims that although [redacted] does not have any ownership interest in the foreign company, he controls the company through his son, who is the company's sole owner. However, 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). Absent documentary evidence to the contrary, the sole owner of the foreign company, [redacted] is deemed to have *de jure* control of the company.

In addition, the record contains no evidence to establish that [redacted], the owner of the foreign company and minority shareholder in the U.S. company, exercises "de facto" control over the U.S. entity. In order to establish "de facto" control by an individual, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes*, 18 I&N Dec. 289, 293 (Comm. 1982). A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999). The petitioner has submitted no documentation to suggest that [redacted] has individual control over the voting rights of a majority of the issued shares. In fact, counsel asserts that the United States company is controlled by Mr. [redacted] who was the largest shareholder at the time the petition was filed.

In addition, counsel's statement on appeal that CIS previously recognized the qualifying relationship between the two companies is not persuasive. The petitioner admits that the ownership of the foreign company

recently changed, presumably after the initial petition was filed. The record contains no evidence regarding the previous ownership structure of the foreign entity, and it is possible that a qualifying relationship did exist at the time the initial L-1 petition was approved in 2002. It must be emphasized that each petition filing is a separate record of proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). As the director properly reviewed the record before him, and as the petitioner grants that the facts are not the same as those submitted with the beneficiary's previous L-1 petition, the petitioner has no basis to rely on its previous L-1 approval as evidence that the U.S. and foreign entities were maintaining a qualifying relationship at the time the current petition was filed.

Finally, the AAO recognizes the petitioner's submission of evidence that, as of December 24, 2003, Mr. [redacted] owns 60 percent of the issued and outstanding stock of the petitioner, thus establishing an affiliate relationship between the foreign entity and the U.S. entity. However, 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 did not establish that it had a qualifying relationship with the foreign entity at the time of filing. For this reason, the petition may not be approved.

The second issue in the present matter is whether the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity under the extended 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 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 described the beneficiary's job duties as follows:

> [The beneficiary] is on our management team as [sic] has been in-charge of all of our sales overseas. He currently manages our entire U.S. operations, manages all sales overseas, hires and fires all persons in his company, and runs his entire department.

On October 24, 2003, the director requested additional evidence that the beneficiary would be employed in a qualifying managerial or executive capacity. Specifically, the director requested (1) a detailed, comprehensive description of the beneficiary's proposed duties including a delineation of the proportion of time devoted to specific duties; (2) job descriptions for the beneficiary's subordinates, if any; and (3) evidence of wages paid to employees for the prior year, including copies of Form 941, Employer's Quarterly Federal Tax Return, and State Unemployment Compensation Report Forms.

In response, the petitioner submitted the requested documentation, showing that it employed three individuals, including the beneficiary, at the time of filing. The petitioner also provided the following description of the beneficiary's duties:

a) Conducts meetings with and travels to potential customers, customers, and vendors (30%);
b) Negotiates contract prices with customers and vendors (20%);
c) Reviews sales by employees, including their incentive programs (10%);
d) Handles customer service and quality assurance (10%);
e) Reviews accounts payables/receivables (10%);
f) Ensures corporate business compliances, i.e. taxes, reporting, etc. (10%);
g) Reviews employee payroll (5%); and
h) Supervises his staff (5%).

The petitioner also described the duties of the two payroll employees - a part-time administrative assistant who performs clerical duties, and a part-time assistant, who is primarily responsible for warehouse, inventory and shipping duties but performs some sales work. The petitioner also stated that it employs a salesman on

commission who "meets with and travels to customers, potential customers, and vendors, and negotiates contract prices with customers and vendors." The petitioner did not provide any evidence of payments to this sales person or indicate how much time he devotes to the business.

The director denied the petition, concluding that the beneficiary would not be performing primarily managerial or executive duties under the extended petition. Rather, the director determined that it appeared the majority of the beneficiary's duties would be devoted to sales duties, and that he did not supervise a staff of professional, managerial or supervisory employees. Further, the director noted that the staff would not relieve the beneficiary from performing non-managerial duties.

On appeal, counsel for the petitioner asserts that the beneficiary performs only managerial and executive duties, and that he is not required to supervise managerial, supervisory or professional employees in order to qualify for classification as a manager or executive under section 101(a)(15)(L) of the Act. Counsel also asserts that the subordinate staff is sufficient to relieve the beneficiary from performing non-managerial duties.

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.* In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

In this case, the petitioner complied with the director's request to specify the proportion of time devoted to each responsibility. However, the petitioner's description of the beneficiary's duties reveals that he devotes a full 50 percent of his time to conducting meetings and negotiating contract prices with customers and vendors. While the petitioner claims that all of the beneficiary's duties are clearly management-level, the petitioner does not explain how these duties differ from those of a sales representative. In fact, two of the beneficiary's subordinates, the part-time assistant and the commissioned sales person, are described as performing *exactly the same* sales duties. In addition, the petitioner states that the beneficiary devotes an additional ten percent of his time to customer service and quality assurance tasks, but does not explain how these responsibilities are managerial in nature. Since the beneficiary actually sells the petitioner's product, negotiates contracts and provides customer service, he is performing tasks necessary to provide a service or product, and these duties, which comprise 60 percent of his time, 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).

Counsel correctly observes that a beneficiary does not need to supervise a staff of managerial, supervisory or professional employees in order to be considered a manager as defined by section 101(a)(44)(A) of the Act,

and the record establishes that the beneficiary does not supervise such a staff. However, the petitioner must still establish that the company employs a sufficient staff to relieve the beneficiary from primarily performing non-qualifying duties. As noted above, the beneficiary devotes half of his time to the same routine sales duties performed by his non-managerial, non-professional staff. Based on the payroll documents provided, the beneficiary's subordinate staff consists of a part-time administrative assistant who works no more than 14 hours per week and a part-time assistant who works no more than 20 hours per week, assuming that both employees receive the minimum wage. It is not clear who would be responsible for non-qualifying clerical, inventory, shipping, and warehouse duties the remainder of the week, if not the beneficiary. Although the petitioner claims that it employs a sales person on commission, the petitioner has provided no information regarding the number of hours this person typically works, or submitted documentary evidence that it has actually paid him for his services. 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).

Counsel asserts for the first time on appeal that the beneficiary will also serve as an executive with the U.S. entity, stating that he "directs the management of the U.S. entity, establishes the goals and policies of the U.S. entity, and receives only general direction" from the company's president in Pakistan. However, these duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Suppp. 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.). Furthermore, the petitioner previously stated that the beneficiary devoted 100 percent of his time to the eight duties described above. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Since the beneficiary does not supervise a subordinate staff of managerial, supervisory or professional employees, the petitioner could alternatively submit evidence that he manages a function in order to establish his eligibility for the benefit sought. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an essential function within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. 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). In this matter, the petitioner has not specifically identified a function managed by the beneficiary or provided evidence that the beneficiary manages an essential function. As the manager of the U.S. sales office, he may be considered to be

responsible for the United States sales function. However, as discussed above, the record indicates that he actually performs the sales function rather than manages the function.

The fact that an individual manages a small business and is assigned a managerial or executive job title does not necessarily establish eligibility as an intracompany transferee. While the beneficiary may perform some management-level duties, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a *primarily* managerial or executive capacity. The petitioner indicates that it plans to hire additional managers and employees in the future. However, 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). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3). For this additional 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.