U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

D7

File: SRC 04 109 50069 Office: TEXAS SERVICE CENTER Date: DEC 01 2005

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, 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a limited liability company organized in the State of Florida that is described as a stained glass and glass frosting business, seeks to employ the beneficiary as its production manager. The petitioner claims that it is the affiliate of [redacted] located in Lincolnshire, United Kingdom.

The director denied the petition, determining that the petitioner had failed to establish that (1) the petitioner and the organization which employed the beneficiary in the United Kingdom were qualifying organizations; or (2) the beneficiary had been employed in a managerial or executive capacity while 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 submits a brief which seeks to clarify the petitioner's relationship with the foreign entity and the beneficiary's position while employed abroad.

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.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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; and

(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 primary issue in the present matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

(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, or

(*3*) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the British entity and the U.S. entity are affiliates. Specifically, the petitioner asserts that a common owner, namely, [redacted] owns a fifty percent interest in each company and that these interests thereby satisfy the definition of affiliate.

The director found that the initial evidence submitted with the petition to be insufficient to qualify the petitioner for the benefit sought and issued a request for evidence on March 12, 2004. In the request, the director specifically required the petitioner to submit evidence that definitively established its qualifying

relationship with the British company.[1] On March 22, 2004, the petitioner submitted a detailed response to the director's request which was accompanied by numerous corporate documents for the U.S. and British companies, as well as additional documentary evidence in support of the claimed affiliation. Additionally, counsel for the petitioner submitted a copy of the petitioner's franchise agreement with Stained Glass Overlay as further evidence of the qualifying relationship between the parties.

Upon review of the evidence submitted, the director concluded that the owners of record of both the U.S. and British entities did not own the same share or proportion of both entities as required by the regulations. Additionally, the director concluded that the petitioner's claim of affiliation with the foreign entity was invalid due to its misplaced reliance on the franchise agreement with Stained Glass Overlay. As a result, the petition was denied on April 3, 2004.

The petitioner appealed the decision, asserting that the director's decision erroneously focused on the franchise agreement and ownership of the franchisor and disregarded the actual ownership of the petitioner and the foreign entity. Specifically, counsel asserts that by way of the [redacted] common ownership of fifty percent of both the petitioner and the foreign entity, the petitioner's relationship with the foreign entity meets the definition of affiliate. In support of this contention, counsel for the petitioner provides a detailed discussion of the ownership interests of both the U.S. and foreign entities.

Upon review, the petitioner has established that the U.S. and foreign entities are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

Specifically, the statute requires that the beneficiary come to the United States to "render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." Section 203(b)(1)(C) of the Act. Critical to its claimed eligibility, the petitioner asserts that the U.S. corporation is an affiliate of [redacted], based on the similar ownership interests of one individual out of the two distinct groups of owners.

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*, 19 I&N Dec. at 595.

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

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[1] The request for evidence also required the petitioner to submit additional evidence with regard to the current financial status of the U.S. entity as well as evidence that the British entity was doing business as required by the regulations. Since the director did not base his denial on these issues, there is no need for the AAO to address them in its review of this matter.

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.

According to the evidence submitted, the U.S. and foreign entities were not owned in the majority by any one person and were not owned in their entirety by the exact same persons. Specifically, the ownership interests set forth by counsel are as follows:

Foreign Entity	Shares/Units
[redacted]	100
	100

U.S. Entity	Shares/Units
[redacted]	50
	20
	15
	15

It is evident based on the evidence provided to corroborate the ownership interests that [redacted] owns fifty percent of both the U.S. petitioner and the foreign entity. He does not own a majority interest in either entity, nor does he share ownership with the same group of individuals. However, his ownership interest in each of the companies is clearly established in the record.

Consequently, the crucial element to examine in this matter is his control of each entity. The evidence clearly establishes that the beneficiary is a 50% owner of the U.S. entity and a 50% owner of the foreign entity. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In this matter, it is evident that the beneficiary has *de facto* control over both entities. Fifty percent ownership is sufficient to prevent action by the petitioner through the exercise of the beneficiary's veto power. *See Matter of Siemens Medical Systems, Inc.*, 19 I & N Dec. 362 (BIA 1986). Therefore, absent any indication that the beneficiary's 50% control of either company is undermined in any way, he would have *per se* control. *Id.* In this case, the AAO finds that the evidence in the record is sufficient to establish that the entities are affiliates and thus are qualifying organizations per the definition at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). Thus, the director's decision with regard to this issue is hereby withdrawn.

The AAO notes that the director bases part of the decision on the ownership status of the franchisor in the United States. The issue in this matter, however, is the ownership of the foreign entity for whom the

beneficiary has been employed as well as the ownership of the U.S. petitioner. The fact that the petitioner and the foreign entity both choose to enter into franchise agreements is irrelevant for purposes of this analysis, as counsel correctly asserts on appeal. The key question is whether there is common ownership and control of the petitioner and the foreign entity, which as discussed above has been established in this matter. Accordingly, the director's misapplied analysis of the role of franchises will be withdrawn and will not be considered further.

The second issue in this matter is whether the beneficiary was employed abroad in a capacity that was primarily managerial or executive as required by 8 C.F.R. § 214.2(l)(3)(iv).

In this case, the director found that the petitioner had not established that the beneficiary had been employed in a primarily managerial or executive capacity. In a letter dated February 27, 2004, the petitioner alleges that the beneficiary has been employed by the foreign entity as a deliveries manager since August 1999. According to the petitioner, his duties included unloading incoming trailers, sorting and tracking parcels, and overall responsibility for the night operations, computer operations, and the organization of delivery loads to ensure accurate and timely deliveries. The petitioner also submitted a resume for the beneficiary, which broke down his employment with the foreign entity as follows:

> Aug 99 to February 2000. Night Loader. [R]esponsible for unloading incoming trailers, sorting and tracking parcels to their correct location.
>
> Feb 2000 to October 2001. Night Manager. Responsible for entire night operation with team of three loaders. Also responsible for computer operation and [organization] of loads. Qualifies NVQ Supervisor level 2 including First Aid, Health and Safety, Business Management.
>
> Oct 2001 to Present. Area Driver Manager. Responsible for delivery and collections to Peterborough City Centre. Sorting up to 120 deliveries including computer tracking and route sheet preparation. Carrying out the deliveries to strict time schedules in busy city centre of Peterborough followed by radio requested collection and collections from regular customers. This is the most active and difficult delivery area in the depots area and requires very careful planning and concentration to achieve the company's 99% delivery standard.

The director found this initial evidence to be insufficient to establish that the beneficiary had been employed abroad in a primarily managerial or executive capacity. Consequently, in a request for evidence issued on March 12, 2004, further information regarding the beneficiary's employment abroad was requested. In a response dated March 22, 2004, the petitioner submitted additional evidence in support of the claimed managerial and/or executive employment, including a personnel chart. The personnel chart identified the beneficiary as one of two "Operations and Warehouse Managers," who oversaw a Computer Systems Manager and a Night Supervisor. In addition, a payroll summary for March 2004 indicated that the beneficiary received weekly wages in the amount of £227.97.

The director denied the petition on April 3, 2004, finding that the petitioner had failed to demonstrate that the beneficiary had been employed abroad for a least one of the previous three years in a capacity that was primarily managerial or executive. Upon review of the record, the AAO concurs with the director's decision.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "sorting deliveries" and "unloading trailers" do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

The actual duties themselves reveal the true nature of the employment. *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). In this case, the majority of the beneficiary's tasks involve first-hand participation in warehouse operations and route deliveries. These duties are essential to the ongoing success of the foreign entity's business and incorporate the crucial daily services provided by the foreign entity to its customers. 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 petitioner seems to rely on the beneficiary's managerial title as the basis for claiming that he has been employed abroad in such a capacity. However, the evidence contained in the record does not support this contention. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this case, although the petitioner claims that the beneficiary's is a warehouse and operations supervisor, he is not overseeing professional employees and furthermore is not refraining from engaging in the standard warehouse operations.

Finally, the AAO notes that, although an excerpt of a payroll record has been submitted for March 2004, no additional evidence verifying the beneficiary's employment with the foreign entity has been submitted. The regulations require the petitioner to show that the beneficiary has been employed for one continuous year out of the previous three years in a capacity that was primarily managerial or executive. No documentation verifying his employment or establishing the capacity in which it claims he was employed has been submitted. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In conclusion, the AAO finds that the beneficiary was not employed in a primarily managerial or executive capacity with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(iv). For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.