U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

MAY 04 2005

File: SRC-03-063-50234 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 President/General 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 operates a convenience store. The petitioner claims that it is the subsidiary of Nadir Electronics, 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 the petitioner did not establish that: (1) the beneficiary will be employed in the United States in a primarily managerial or executive capacity; (2) the petitioner has a qualifying relationship with a foreign entity; (3) the beneficiary's foreign employer continues to do business; and (4) the petitioner has been doing business for the past year.

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 asserts that the petition should be approved, particularly in light of a Citizenship and Immigration Services (CIS) interoffice memorandum from [redacted] Associate Director for Operations, dated April 23, 2004. Counsel further asserts that the director overlooked evidence entered into the record which supports the petitioner's eligibility. In support of these assertions, counsel submits a brief and 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 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 a letter submitted with the initial petition on December 27, 2002, the petitioner described the beneficiary's job duties as follows:

> In 2001, [the beneficiary] was transferred to a newly established U.S. office of [the petitioner] . . . in order to manage, direct, and develop the new business enterprise. This extension is being requested so that he can continue to serve as President and General Manager of the U.S. business operation and will be totally responsible for establishing and managing the corporate entity within the U.S. He will continue to be responsible for managing, controlling, implementing, and administering the total operations.

On July 1, 2003, the director requested additional evidence. In part, the director requested evidence of the petitioner's current staffing level, including the position titles and duties of all employees, and the educational background of any professionals.

In a response dated September 26, 2003, in part the petitioner submitted a document that describes the petitioner's staffing as follows:

Name of Employee	**Position**	**Duties**
[The beneficiary]	President/General Manager	Formulate policies and manage daily operations.

[redacted]	Sales Person	Sell Merchandise in retail establishment. Runs the register, does restocking of goods and some inventory.
[redacted]	Sales Person	Sell Merchandise in retail establishment. Runs the register, does restocking of goods and some inventory.

On April 6, 2004, the director denied the petition. In part, the director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated that "there is no evidence that the beneficiary's duties are either managerial [or] executive . . . ." The director noted that the beneficiary will have two sales persons as subordinates.

On appeal, counsel asserts that the petition should be approved, particularly in light of a recent CIS interoffice memorandum from William R. Yates, Associate Director for Operations, dated April 23, 2004. Counsel states that there have been no changes in the facts underlying the present petition since the initial new office petition was approved. Counsel further asserts that the beneficiary now supervises five subordinate employees, and that such an increase in staffing shows that the petitioner "is a growing business which does require managerial control typical of an L-1A position." As evidence of the petitioner's growth, the petitioner provides its IRS Form 1120S, U.S. Income Tax Return for an S Corporation, an unsigned business lease, and records of banking activity that occurred after the date of filing the petition.

Upon review, counsel's assertions are not persuasive. Counsel suggests that the April 23, 2004 CIS Interoffice Memorandum limits the discretion of the director to deny the petition in the absence of a material error in the prior grant, a substantial change in circumstances, or new information that adversely impacts the petitioner's eligibility. Yet, in the prior petition, the petitioner indicated that it was a new office, and the petition was adjudicated under the relevant regulations for new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). In the present matter, the petitioner is no longer a new office, and the regulation at 8 C.F.R. § 214.2(l)(3)(v) does not apply. As the petitioner is requesting a first extension after the opening of a new office, the petitioner must now satisfy its burden under the regulation at 8 C.F.R. § 214.2(l)(14)(ii) in order to establish eligibility. Accordingly, the fact that the petitioner is no longer a new office, and is now requesting a first extension after opening a new office, represents a changed circumstance. The director had a duty to carefully examine the present petition and render a full adjudication, as the petitioner has new regulatory requirements in the present proceeding that did not apply to the prior petition. *See* 8 C.F.R. § 214.2(l)(14)(ii). In fact, the first and only footnote of the memorandum specifically states that it does not apply to "L-1 'new office' extension petitions." Memorandum of William R. Yates, Associate Director for Operations, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity*, HQOPRD 72/11.3 (April 23, 2004). The director's analysis was appropriate in light of the referenced memorandum and the petitioner's evidentiary burden. The AAO further notes that the

April 23, 2004 CIS Interoffice Memorandum was directed to Service Center Directors and Regional Directors. The referenced memorandum is not binding on the AAO.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

The job descriptions submitted by the petitioner are brief and vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statements that the beneficiary will "manage, direct, and develop the new business enterprise" and he "will continue to be responsible for managing, controlling, implementing, and administering the total operations" do not indicate what tasks the beneficiary will perform on a daily basis. In response to the director's request for evidence, the petitioner merely stated that the beneficiary will "[f]ormulate policies and manage daily operations," yet this broad assertion fails to account for what actual tasks the beneficiary will perform. 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). The actual duties themselves reveal the true nature of the employment. *Id.* The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform on a daily basis, such that they can be classified as managerial or executive in nature.

Counsel asserts that the beneficiary now has five subordinates. However, in the initial petition and in response to the request for evidence, the petitioner provided that the beneficiary will manage two subordinates. Further, the record shows that the beneficiary has never supervised more than one subordinate. The petitioner's Texas Employer's Quarterly Report for the fourth quarter of 2002 reflects that only one of the beneficiary's claimed subordinates, [redacted] was employed by the petitioner throughout the covered period. As the petition was filed on December 27, 2002, the beneficiary only had one subordinate as of the date of filing. The petitioner's Texas Employer's Quarterly Report for the first quarter of 2003 reflects that the petitioner hired the beneficiary's second claimed subordinate [redacted] in March of 2003, after the date of filing. Thus, the evidence of record shows that the petitioner hired additional employees after filing the petition. Yet, 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 fact that the petitioner hired additional workers after filing the petitioner is not probative of the petitioner's eligibility as of the date of filing.

It is further noted that the employee that the beneficiary purportedly supervised as of the date of filing is no longer employed by the petitioner, according to the petitioner's Texas Employer's Quarterly Report for the first quarter of 2003.

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* section 101(a)(44)(A)(ii) of the Act. Even if the beneficiary's subordinate sales person was still employed by the petitioner, the petitioner has failed to establish that the sales person is a supervisory, professional, or managerial employee.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not provided the educational qualifications of the beneficiary's subordinate. Thus, the petitioner has failed to show that the beneficiary's subordinate is a professional. Nor has the petitioner shown that the beneficiary's subordinate supervises other staff members or manages a clearly defined department or function. Thus, the petitioner has not shown that the sales person is a manager or supervisor. Accordingly, the petitioner has not shown that the beneficiary's subordinate employee is supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

The evidence of record reflects that the beneficiary would act as a first-line supervisor. Yet, 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).

The record is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The regulation at 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 managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3). For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it has a qualifying relationship with a foreign entity.

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

> (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.
>
> (H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.
>
> (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.
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> (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 . . . .

In the initial petition, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer, as the beneficiary owns 50 percent of the petitioner's stock, and 100 percent of the foreign entity as a sole proprietor. The petitioner provided its articles of incorporation that show that it is authorized to issue 1,000 shares of stock. The petitioner submitted its IRS Form 2553, Election by a Small Business Corporation, that indicates that the beneficiary owns 500 shares of the petitioner's stock.

In the request for evidence, the director instructed the petitioner to provide further documentation of the ownership and control of the foreign entity. In response, the petitioner submitted numerous documents that name the beneficiary as the sole proprietor of the foreign entity.

In denying the petition, the director found that "[t]here is no evidence of a qualifying relationship between the entities."

On appeal, counsel asserts that the record contains documentation to show that the beneficiary is the sole proprietor of the foreign entity. Counsel further states that "sufficient evidence of the relationship was submitted – **and approved by INS** – in 2001." (Emphasis in original). Counsel or the petitioner do not address the ownership of the petitioner on appeal.

Upon review, counsel's assertions are not persuasive. As noted above, the petitioner indicated that it is the subsidiary of the beneficiary's foreign employer. Yet, the petitioner noted that the beneficiary owns 50 percent of its stock, and 100 percent of the foreign entity. If this claimed ownership was supported by the evidence of record, it would potentially show that the petitioner and the foreign entity are affiliates due to being "owned and controlled by the same . . . individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(*1*). The claimed ownership does not establish that the petitioner is a subsidiary of the foreign entity as defined in the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The 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, CIS is unable to determine the elements of ownership and control.

In the instant matter, the record contains sufficient evidence to establish that the beneficiary owns the foreign entity as a sole proprietor. However, the petitioner has failed to submit sufficient evidence to show the current ownership of its stock. *See* 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner's IRS Form 2553, by itself, is insufficient to show who currently owns the petitioner's shares. Though counsel asserts that evidence of the qualifying relationship was submitted with the prior new office petition, evidence submitted with the petitioner's prior petition does not serve as evidence in the present proceeding. The petitioner must meet its burden by entering required evidence into the current record. 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).

Based on the foregoing, the petitioner has not submitted sufficient evidence to establish that it was owned and controlled by the beneficiary as of the date of filing the petition. Thus, the petitioner has not established that it still has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). For this additional reason, the appeal will be dismissed.

In denying the petition, the director further concluded that the petitioner did not establish that the beneficiary's foreign employer continues to do business and that the petitioner has been doing business for the past year. On appeal, the petitioner submits evidence of its and the foreign entity's business activity that occurred after the date of filing the petition. Again, 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). However, upon review the petitioner has provided sufficient evidence to show that it and the foreign entity have been doing business throughout the previous year. Accordingly, the director's findings on these issues will be withdrawn.

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 this burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.