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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: WAC 06 214 50723 Office: CALIFORNIA SERVICE CENTER Date: DEC 04 2007

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, Chief
Administrative Appeals Office

DISCUSSION: The director, California Service Center, denied the petition for a nonimmigrant visa on October 11, 2006. On November 13, 2006, the petitioner filed a motion to reopen and reconsider the director's decision and, on December 21, 2006, the director affirmed the prior decision. The petitioner filed an appeal on February 1, 2007. The director rejected the appeal as untimely on February 8, 2007.[1] The director also did not treat the untimely appeal as a motion pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(*2*), because it did not meet the applicable requirements for either a motion to reopen or a motion to reconsider as described in 8 C.F.R. § 103.5(a).

On July 12, 2007, the petitioner filed an action in the United States District Court for the Eastern District of New York challenging the director's decision. As a result of this litigation, the director reopened the matter, issued a new decision denying the petition on September 26, 2007, and immediately certified the decision to the AAO for review. The Form I-290C accompanying the new decision instructed the petitioner to file a brief or written statement with the AAO within thirty days. A brief and additional evidence was submitted to the AAO on October 26, 2007. Upon review, the AAO will affirm the director's decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its manager as an L-1B nonimmigrant intracompany transferee having specialized knowledge 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, a corporation formed under the laws of the State of New York, claims to operate a hair and beauty salon. The petitioner asserts that it has a qualifying relationship with the foreign employer, [redacted] of India.[2]

Citing numerous inconsistencies in the record pertaining to the petitioner's ownership and control, the director denied the petition on October 11, 2006 concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. Furthermore, in considering assertions made in the petitioner's November 13, 2006 motion to reopen and reconsider addressing the qualifying relationship issue, the director also concluded that Prithipal S. Bhatti, who signed the Form I-129, did not have the authority to sign this document and, thus, the form is "invalid and may not be accepted as properly filed." The director reiterated these bases for denying the instant petition in the certified decision dated September 26, 2007.

Upon certification, counsel asserts that, while the petitioner is only 15% owned by the foreign employer, the foreign employer nevertheless "controls" the petitioner and, thus, it has been established that it and the foreign

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[1]It is noted for the record that, prior to rejecting the appeal as untimely, the petitioner's appeal was not forwarded to the Administrative Appeals Office (AAO) for consideration. The AAO has not played any role in the adjudication of the petition, the motion to reopen and reconsider, or the appeal filed on February 1, 2007 until the certification of the director's decision on September 26, 2007.

[2]It is noted that, according to the records of the New York Department of State, the petitioner's corporate name is actually [redacted]" However, because the petitioner describes itself as [redacted]." in both the Form I-129 and in the action filed in the United States District Court for the Eastern District of New York, the AAO will refer to the petitioner as "Habibs G. Hair & Beauty Salon Inc." in this matter.

employer are qualifying organizations. Counsel does not directly address Mr. Bhatti's authority to sign the Form I-129 upon certification.[3]

Upon review and for the reasons discussed herein, the AAO agrees with the director's decision and the petition shall be denied.[4]

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

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[3]It is noted that the reconstructed record does not contain a Form G-28, Entry of Appearance as Attorney or Representative, for counsel to the petitioner. However, given that the California Service Center has recognized counsel and that the instant case has been certified to the AAO for review, the AAO will recognize counsel in this limited context. However, it must be emphasized that the regulations only permit an attorney to file an appeal or motion with the AAO if he or she has been authorized to represent the affected party through the proper completion of a Form G-28. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B); § 103.5(a); § 292.1; § 299.1.

[4]As explained above, the director indicated in the decision dated December 21, 2006, which addressed the motion to reopen and reconsider, that Prithipal S. Bhatti, who signed the Form I-129, did not have the authority to sign this document and, thus, the form is "invalid and may not be accepted as properly filed." However, as is clear from the record, the director did accept the petition for adjudication. The director did not reject the petition. *See* 8 C.F.R. § 103.2(a)(7). Therefore, it appears that this determination by the director is moot given her consideration, and adjudication, of the petition. Regardless, to the extent that the director is relying on Mr. Bhatti's purported lack of authority to sign the Form I-129 in denying the petition, that determination is hereby withdrawn as being incongruous with the regulations and the director's ultimate consideration of the merits of the petition.

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 primary issue is whether the record establishes that the petitioner and the foreign employer are "qualifying organizations." 8 C.F.R. § 214.2(l)(3)(i).

Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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." A "subsidiary" is defined in pertinent part as a corporation of which a parent "owns, directly or indirectly, less than half of the entity, but in fact controls the entity." 8 C.F.R. § 214.2(i)(l)(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 (Comm. 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; *see also Matter of Hughes*, 18 I&N Dec. 289, 292.

In this matter, the petitioner asserts that it is 15% owned by the foreign employer, Habibs Hair and Beauty Studio Pvt., Ltd. The remaining 85% of the petitioner's stock is apparently owned by the beneficiary and Prithipal Singh (also known as Prithipal Bhatti). In support of this assertion, the petitioner submits unsigned stock certificates.[5] The foreign employer appears to be 100% owned and controlled by Jawed Habib. Despite this ownership structure, the petitioner describes the control of the United States enterprise in the L Classification Supplement to Form I-129 as follows:

> Habibs Hair Style and Beauty Salon in India is a 15% shareowner HOWEVER retains sole control over inventory and equipment along with its goodwill and tradename[.] Full technical guidance will remain in the control of Habibs (India).

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[5]It is noted that the record contains numerous inconsistencies pertaining to the ownership of the remaining 85% of the petitioner's stock. However, as the petitioner consistently claims that neither the foreign employer nor Jawed Habib owns more than 15% of the stock, the ownership of this majority interest is not directly relevant to whether the minority owner, the foreign employer, in fact "controls" the petitioner since the remaining 85% of the stock is owned either by the beneficiary, a third party, or both of them. Therefore, this matter need not be further addressed by the AAO.

The petitioner also described its "control" by the foreign employer in a letter dated September 28, 2006 as follows:

> The name [redacted] is internationally recognized. The parent company under Mr. [redacted] thus retains all the rights to the goodwill. Further, Mr. [redacted] provides the inventory for Habibs brand name of herbal hair and beauty products, including Habibs Henna, oil, and serum.

The petitioner did not submit copies of any contracts, stock proxies, or other documents to substantiate its claim that, despite the foreign employer's minority interest in the corporation, the foreign employer in fact "controls" the petitioner.

On October 11, 2006, the director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. The director reiterated this conclusion in the decisions dated December 21, 2006 and September 26, 2007.

On certification, counsel to the petitioner also asserts that, despite its minority ownership interest, the foreign employer in fact "controls" the petitioner. Relying on *Matter of Church Scientology International*, 19 I&N Dec. at 595 and *Matter of Hughes*, 18 I&N Dec. 289, counsel argues the following:

> In determining whether a qualifying relationship exists, [Citizenship and Immigration Services (CIS)] should consider the following factor: common name, regular sharing and exchange of personnel; cross directorship; sharing technical, financial and research skills; and size and general organization.
>
> * * *
>
> While [the beneficiary] serves as manager with specialized skills and therefore manages the U.S. entity and exercises discretion over the day-to-day operations of the U.S. entity [sic]. However, she exercises such discretion in compliance with the established policies and practices of [redacted] and [redacted]d. [redacted] and Beauty [redacted] Ltd. has control overall [sic] policy and practices of the U.S. entity including, but not limited to, decisions on additional locations, products to be used, services to be offered, corporate practices and policies, quality control, etc.
>
> [redacted]. did not contribute direct capital to the U.S. entity but rather allowed the use of its internationally known name, use of cosmetic and beauty products, and corporate practices in policy. In addition, [redacted] and [redacted] Ltd. invested its goodwill which it has worked to obtain over many years. This company is well-known in India and Southeast Asia and essentially is a household name in that region of the world. In addition, [redacted] and [redacted] provided the U.S. entity with beauty supplies at an expense to itself to assist the fledgling U.S. entity during its startup years [citation omitted].

* * *

[redacted] exercises control over the U.S. entity [citation omitted]. Before the project was started, [redacted] and [redacted], Ltd. put together a Business Plan regarding the establishment of the new salon in New York [citation omitted]. In addition, [redacted] and [redacted] frequently corresponds with the U.S. entity regarding invitations to speak, press releases, and other business issues [citation omitted]. In addition, the U.S. entity purchases all its supplies either from Habibs [redacted], Ltd.'s sister companies or other companies which have been authorized by [redacted] and [redacted]. [citation omitted]. Finally, [redacted] includes New York location on its website (www.habibsinc.com) and all advertisements list the [redacted]s international logo and designate locations in New York as well as India, Bangladesh, Nepal, and the United Kingdom [citation omitted].

The petitioner also submitted a letter dated October 10, 2007 from the foreign employer. The letter, signed only by [redacted] purports to outline its authority to "control" the operation of the petitioner's enterprise in the United States. The letter concludes as follows:

> In conclusion, [the foreign employer] reiterates that it is to exercise all control in making the aforementioned decisions. As [the beneficiary] is fully indoctrinated in [the foreign employer's] policy she is to make day-to-day decisions in compliance with corporate policy. All extraordinary decisions, are to be made by [the foreign employer]. If [the beneficiary] fails to follow policy or any part of the agreement discussed herein, [the foreign employer] will be forced to close the subsidiary. [The foreign employer] will revoke the right to use the name, remove any and all products, and take further action to dissolve the parent-subsidiary relationship.

Upon review, the petitioner has failed to establish that it has a qualifying relationship with the foreign entity. The petitioner has failed to establish that the foreign employer owns, directly or indirectly, less than half of the entity. The petitioner has also failed to establish that the foreign employer "in fact controls the entity." 8 C.F.R. § 214.2(i)(l)(ii)(K).

First, the petitioner has failed to establish that the foreign employer owns any of the petitioner's stock. In support of its assertion that the foreign employer owns 15% of the petitioner's stock, the petitioner submitted stock certificate "No. 1" dated May 15, 2003. However, this stock certificate is unsigned. New York law requires that stock certificates to be signed by an appropriate officer or board member. *See* N.Y. Business Corporation Law § 508 (McKinney 2007); *Concrete Construction Systems, Inc. v. Jensen*, 65 A.D.2d 918 (N.Y. App. Div. 4th Dept.). Therefore, as the petitioner has failed to submit evidence establishing that the foreign employer owns, directly or indirectly, any interest in the petitioner, the petitioner has failed to establish that it is a qualifying organization.[6]

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[6]It is noted that any future attempt to establish ownership in the petitioner will have no bearing on the petitioner's, or the beneficiary's, eligibility in this particular matter. The petitioner must establish eligibility at

Second, the petitioner has failed to establish that the foreign employer, assuming that it has a minority ownership interest in the petitioner, in fact "controls" the petitioner. The petitioner asserts that, because the foreign employer is permitting the petitioner to use its tradename, goodwill, and certain proprietary beauty products, it "controls" the petitioner and its beauty salon business. While the underlying record is devoid of evidence corroborating these claims, the petitioner submitted on certification a letter from the foreign employer dated October 10, 2007 purporting to confirm this relationship. However, upon review, this evidence is not persuasive in establishing that the foreign employer controls the petitioner.

As a threshold issue, the October 10, 2007 letter is dated over a year after the filing of the petition in July 2006. Therefore, the letter and the relationship that it describes are not relevant to the instant 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. Furthermore, the October 10, 2007 letter is a unilateral declaration by the foreign employer. The petitioner's assent to this relationship is not established by the letter. Without evidence that the petitioner has actually agreed to the arrangement described in the letter, the letter is not persuasive in establishing that the petitioner is "controlled" by the minority shareholder. 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). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Regardless, even assuming the accuracy of the petition's description of the relationship between the petitioner and the foreign employer, the record is not persuasive in establishing that this relationship constitutes "control" by the foreign minority shareholder. As indicated above, in the context of this visa category, 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; *see also Matter of Hughes*, 18 I&N Dec. at 292. In this matter, the foreign employer's purported acquiescence to the petitioner's use of its tradename, goodwill, and certain proprietary beauty products does not establish that it "controls" the petitioner. Certainly, the foreign employer's extension of these privileges and opportunities to the petitioner may affect the petitioner's assets or even influence its ongoing choice to remain in the beauty salon business. However, this role is not dramatically different from that of any franchisor, principal supplier, creditor, or service provider, and, importantly, does not affect the majority stockholders' legal right and authority to direct the establishment, management, and operations of the petitioner. The record is devoid of evidence establishing that the foreign employer has any contractual or legally enforceable right to control the enterprise or to dissolve the company. The majority stockholders appear free to cause the petitioner to abandon the "Habibs" beauty salon business and to adopt a new name and product line. The petitioner, as directed by the majority stockholders, could even abandon the beauty salon business altogether and choose to pursue an entirely new line of business. While the petitioner indicates that it has subordinated itself to the foreign employer's policies and procedures, this claim also does not establish that the foreign employer "controls" the petitioner. Simply put, all such acts are voluntary

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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).

business decisions taken by the petitioner for its, and its majority stockholders', own financial gain and could be rescinded or abandoned at any time. *See Matter of Schick*, 13 I&N Dec. 647, 649 (Comm. 1970). While the petitioner may have chosen to enter into an important business relationship with [redacted] Pvt., Ltd., this relationship in no way vested the foreign employer with a legal right to direct the petitioner's enterprise, to liquidate the petitioner's assets, to restrict the growth of the enterprise in areas not pertaining to the foreign employer's business, or to fire its employees.

Accordingly, the petitioner has not established that it is a qualifying organization, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary has been employed abroad, or will be employed in the United States, in a capacity involving specialized knowledge or that the beneficiary has specialized knowledge as defined in the Act and the regulations. 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv).

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

> For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines "specialized knowledge" as:

> [S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

In this matter, the record is devoid of evidence addressing the beneficiary's purported specialized knowledge. 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). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724, F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905, F.2d 41 (2d. Cir. 1990).

Furthermore, the description of the petitioner's proposed services in the business plan does not establish that it is a field of endeavor requiring employees to have specialized knowledge. The petitioner has failed to identify any special or advanced body of knowledge which would distinguish the beneficiary's role from that of other similarly experienced operators of beauty salons employed by the foreign entity or in the industry at large. The record does not establish that the beneficiary's knowledge is noteworthy, uncommon, or distinguished by some unusual quality that is not generally known by other experienced workers or that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing

specialized knowledge. *See 1756, Inc. v. Attorney General*, 745 F. Supp. 9, 16 (D.D.C. 1990); *see also Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982).

Accordingly, the petitioner has failed to establish that the beneficiary has been employed abroad, or will be employed in the United States, in a capacity involving specialized knowledge, or that the beneficiary has specialized knowledge as defined in the Act and the regulations, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States. 8 C.F.R. § 214.2(l)(3)(vii).

In this matter, the petitioner claims to be substantially owned by the beneficiary. As a purported owner of the petitioner, the petitioner is obligated to establish that the beneficiary's services will be used for a temporary period and that she will be transferred to an assignment abroad upon completion of the assignment. *Id.* However, the record is devoid of any evidence establishing that the beneficiary's services will be used temporarily. 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. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Furthermore, given the beneficiary's apparent ownership interest in the United States enterprise and the lack of a qualifying relationship with the foreign employer (*see supra*), it is not credible that the beneficiary would, or could, be "transferred" to an assignment abroad. The beneficiary is no longer employed by a qualifying organization and, more likely than not, will remain in the United States to operate her enterprise.

Accordingly, as the petitioner has not established that the beneficiary's services will be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon completion of the temporary assignment in the United States, the petition may not be approved for this additional reason.

The previous approval of L-1B petitions does not preclude CIS from denying an extension based on a reassessment of petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engr. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The director's decision is affirmed. The petition is denied.