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FILE: WAC 02 058 54916 Office: CALIFORNIA SERVICE CENTER Date: JUN 10 2005

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, Green Impex Corporation, states that it is a wholly owned subsidiary of Green Industrial Impex Private Limited, located in India. The petitioner plans to operate an import business dealing in garments and crafts. The U.S. entity was incorporated in the State of California on March 12, 2001 and has no employees. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office. Accordingly, in December 2001, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for two years. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's vice president.

On May 1, 2002, the director denied the petition. The director determined that the petitioner failed to establish that: 1) the U.S. entity had a qualifying relationship with the foreign entity; 2) the beneficiary has been and will be employed in a primarily managerial or executive capacity; and, 3) the beneficiary has been employed abroad for at least one continuous year within the three years preceding the filing of the petition.

On appeal, the petitioner states that: 1) the "documents clearly establish the existence of [a] qualifying relationship;" 2) "the beneficiary has been employed in [a] [m]anagerial capacity with the foreign entity;" 3) the beneficiary's U.S. duties include "the ultimate right, authority and responsibility for each managerial and executive decision;" and, 3) "copies of the attendance cum payroll records" for the beneficiary were submitted to establish that the beneficiary has at least one continuous year at the foreign entity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates 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;
- (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 first issue in this proceeding is whether a qualifying relationship exists between the petitioner and foreign entity. The regulation at 8 C.F.R. 214.2(l)(ii) provides in part:

- (G) Qualifying organization means 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.

* * *

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operation 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.

The regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and foreign organization. *See 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) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

Initially, the petitioner stated on Form I-129 that 100 percent of the U.S. subsidiary's stock is wholly owned by the foreign entity. The petitioner also described the foreign stock ownership as being held by three individuals: S.S. Baweja, 20,800 shares; Randeep Singh, 10,000 shares; and, [REDACTED]

██████████ 10,000 shares. The petitioner submitted a copy of the stock ledger and stock certificate. However, on January 9, 2002, the director requested further information. The director requested original wire transfers showing that the foreign entity actually paid for the U.S. entity's stock. The director also requested copies of the cancelled checks, deposit receipts, or other evidence detailing the monetary amounts for the stock purchase.

In response to the director's request for additional evidence, the petitioner submitted copies of a bank check and a bank deposit receipt and resubmitted a copy of the stock register and stock certificate.

On May 1, 2002, the director denied the petition. The director determined that the petitioner failed to establish that the U.S. entity had a qualifying relationship with the foreign entity. The director found that there was insufficient evidence that the foreign entity "actually provided the U.S. entity with \$12,000 for the stock."

On appeal, the petitioner states, "[The] documents clearly establish the existence of [a] qualifying relationship." The petitioner claims the following documentation previously submitted proves that the \$12,000 was transferred from the foreign entity:

- a) Copy of Bank Draft from State Bank of India, Ludhiana, India for \$12,000 payable at State Bank of India, New York Branch, 460 Park Avenue, New York, NY 10022 no. MYS/2 556603 dated 4th Oct, 2001. . . [;]
- b) Copy of Bank of America's deposit receipt showing a deposit of check of \$12,000 in the account no. 10983-03644 of [U.S.] entity . . . [;]
- c) Copy of bank statement of [the U.S. entity], USA Account no. 10983-03644 with Bank of America for October 2001 showing a deposit of \$12,000 on October 18, 2001. . . [.]

In addition, the petitioner submitted two letters from the State Bank of India, a copy of the check for \$12,000, and a copy of the deposit ticket received from the Bank of America.

On review, the petitioner has failed to establish that a qualifying relationship exists between the petitioner and foreign entity. The petitioner submitted a stock certificate indicating that in March 2001, the foreign entity was the registered holder of 12,000 of the authorized 10,000,000 shares of the U.S. entity's common stock. In addition, the stock ledger indicates that on March 15, 2001 the foreign entity paid \$12,000 for the U.S. entity's stock. However, the petitioner submitted a deposit slip indicating that the \$12,000 was deposited in account number 001098303644 on October 18, 2001, more than seven months after the stock was transferred. The petitioner also claimed that the U.S. entity was a wholly owned subsidiary of the foreign entity and that the foreign entity paid for 12,000 shares of the U.S. entity. Nevertheless, the petitioner submitted a March 15, 2001 Notice of Transaction Pursuant to Corporations Code Section 25102(f), indicating that the petitioner sold \$25,000 worth of common stock. However, it is unclear how

many shares were issued, when the shares were issued, and to whom the shares were issued. Therefore, if the foreign entity claims that it paid for only \$12,000 worth of the U.S. entity's shares then this poses a question as to the remaining \$13,000 worth of shares or 51% majority ownership of the U.S. entity. In addition, the AAO notes that the Notice of Transaction Pursuant to Corporations Code Section 25102(f) did not contain a validating stamp indicating that the transaction had been registered. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

After careful consideration of the evidence, the AAO concludes that the petitioner has failed to establish that a qualifying relationship exists between the U.S. entity and foreign company.

The second issue in this proceeding is whether the beneficiary has been employed abroad for at least one continuous year within the three years preceding the filing of this petition pursuant to 8 C.F.R. § 214.2(l)(3)(iii).

On January 9, 2002, the director requested additional evidence concerning the beneficiary's employment abroad. In particular, the director requested copies of the foreign entity's payroll records "pertaining to the beneficiary for the year preceding the filing for the first petition for L-1 status." However, the petitioner responded to the director's request by submitting payroll records that did not include the beneficiary's name.

On May 1, 2002, the director denied the petition. The director determined that the petitioner did not show that the beneficiary has been employed abroad for at least one continuous year. The director found that the beneficiary's name was not on the payroll records.

On appeal, the petitioner claims that the "copies of the attendance cum payroll records" for the beneficiary were submitted to establish that the beneficiary has at least one continuous year at the foreign entity. The petitioner claims that CIS chose to "overlook these records and thereby deny the petition." The petitioner also claims that the employment certificate from the parent company, the beneficiary's personal tax returns for 1999 through 2000, and a bank statement show that the foreign company paid the beneficiary.

On review, the AAO concurs with the director's conclusion. The petitioner has failed to establish that the beneficiary has been employed abroad for at least one continuous year within the three years preceding the filing of this petition. 8 C.F.R. § 214.2(l)(3)(iii). The payroll records do not indicate that the beneficiary has been paid by the foreign entity. Although on appeal the petitioner claims it has highlighted the beneficiary's name on the payroll records, the highlighted name does not correspond to the name appearing on Form I-129.

Further, the AAO notes that there are several discrepancies in the record concerning the beneficiary's name. On Form I-129, the petitioner named the beneficiary as Randeep S. Baweja. However, on the payroll records, the petitioner claims that the highlighted name, Randeep Singh, refers to the beneficiary. In addition, in an October 10, 2001 letter, signed by the director of the foreign company, the director refers to a [REDACTED]. Also, a March 22,

2002 letter signed by the foreign entity's managing director [REDACTED] refers to [REDACTED]. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

The AAO now turns to the third issue in this proceeding of whether the beneficiary has been employed in a qualifying managerial or executive position abroad and whether the petitioner will support an executive or managerial position within one year of operation. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

The petitioner initially submitted some documentation on the issue of whether the beneficiary has been employed in a qualifying executive or managerial capacity or will be employed in a managerial or executive capacity within one year of operation. The petitioner described the beneficiary's foreign duties as:

[The beneficiary] is the overall [sic] in charge of the new Business development, International operations and marketing of the organization. In these areas, he has the ultimate authority to hire and fire the staff, appraise the performance of staff for their increments and promotions, and take on lease, buy or otherwise acquire office space and other infrastructure, negotiate and sign contracts for buying and selling [the] company's raw material and finished products, and arrange finances, decide the structure of prices charged and other important matters.

In addition, the petitioner described the beneficiary's proposed U.S duties as:

With [the beneficiary's] knowledge and vast experience of the intricacies of the company's home products and exposure of dealing with clientele from all over the world his presence in the United States at this juncture to oversee the development and growth of the business from the new office, is considered very vital. [The beneficiary] has already entered into a few contracts on behalf of the [U.S.] Company for marketing the products of the Indian company. Functionally [the beneficiary] shall be head of the [U.S.] operations and to this end he shall have full authority for business development, secure contractual assignments for the corporation, oversee its execution, plan and arrange the infrastructure required, arrange the finances required, devise the pricing structure, hire staff as are required, and supervise and manage the day to day operations.

On January 9, 2002, the director issued a request for additional evidence. In particular, the director requested a more detailed description of the beneficiary's duties abroad and proposed duties in the United States. The director requested a list of the beneficiary's subordinates and the percentages of time the beneficiary spends and will spend on his assigned duties abroad and in the United States.

In response to the request for evidence, the petitioner submitted further information concerning the beneficiary's duties abroad and proposed duties in the United States. The petitioner stated that the beneficiary was manager of the foreign entity in 1999 and later promoted to executive director in April 2001. The petitioner described the beneficiary's foreign duties as being in charge of "[n]ew [b]usiness development, [e]xports [and] [i]nternational operations, [p]roduction of [g]arments [and] [h]andicrafts, [p]rocurement of raw material, [and] [m]arketing of both the [g]arments [and] [h]andicrafts division as well as the [s]teel [d]ivision of the organization." The petitioner also reiterated the beneficiary's foreign duties submitted initially with the petition.

In addition, in reference to the beneficiary's proposed U.S. duties, the petitioner reiterated some of the beneficiary's proposed U.S. duties and submitted the time the beneficiary spends on his duties in the United States:

- Planning and developing policies, 25%
- Directing legal affairs, 5%
- Directing designing of garments, 15%
- Planning and supervising marketing, 25%
- Supervising financial matters, 15%
- Managing day-to-day operations, 15%

The petitioner also claimed that the time the beneficiary spends in the above "managerial or executive functions could vary from time to time depending on the need and importance of each of the functions in various situations and at different times."

On May 1, 2002, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. The director found that the petitioner described the beneficiary's foreign and proposed duties in general terms.

On appeal, the petitioner states that "the beneficiary has been employed in [a] [m]anagerial capacity with the foreign entity" and that the beneficiary's U.S. duties include "the ultimate right, authority and responsibility for each managerial and executive decision." The petitioner also reiterated again the beneficiary's foreign and proposed U.S. duties.

In 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). On review, the AAO finds that the beneficiary has not been and will not be within one year of operation employed in a managerial or executive capacity as required by 8 C.F.R. § 214.2(l)(3)(v)(b). The petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary has been performing or will be performing on a day-to-day basis. For instance, the petitioner's foreign duties were described as "overall in charge of the new Business development," "has the ultimate authority to hire and fire the staff," "negotiate and sign contracts," and "arrange finances." In addition, the beneficiary's proposed U.S. duties were described as "head of the [U.S.] operations," "hav[ing] full authority for business development," and "supervise[ing] and manag[ing] the day to day operations." The petitioner did not, however, define or clarify these duties. 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)).

Further, the petitioner submitted a breakdown of the beneficiary's proposed U.S. duties. For example, the petitioner claimed that the beneficiary will be spending 25% of his time "planning and developing policies" and 15% of his time "directing designing of garments." However, the petitioner fails to explain what policies the beneficiary will plan and develop or how the beneficiary will direct the designing of garments. In addition, the petitioner claims that the

beneficiary's "knowledge and vast experience of the intricacies of the company's home products and exposure of dealing with clientele from all over the world" is considered very vital. However, the petitioner failed to explain how the beneficiary will draw upon this knowledge for the benefit of the new operation. 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).

Moreover, when a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The AAO notes that the petitioner's business plan lacks specificity and is also vague. In examining the business plan, the precedent decision, *Matter of [name not provided]*, WAC-98-072-50493, 22 I&N Dec. 206, 213 (Comm. 1998), lists possible criteria for establishing an acceptable business plan. "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although this case addresses the specific requirements for the immigrant investor visa classification, the discussion of the business plan requirements is instructive for the L-1A new office requirements. *Id.* In the instant matter, the December 3, 2001 letter describing the business lists undefined goals such as the petitioner proposes to "carry out the same line of business in concert with our parent organization" and "shall market the steel products of the parent organization, design and market all kinds of traditional and ethnic fashion garments, handicrafts, artificial jewelry and home furnishings. . . ." These goals are non-specific and broad. The petitioner also provides an explanation of market trends; however, the petitioner fails to explain how its business plan specifically relates to these trends.

Further, the petitioner submitted organizational charts for the foreign and U.S. entity. However, it is unclear how the foreign organization will support the U.S. entity. Specifically, the charts show intricate arrows that fail to clearly identify the supervisors' and subordinate employees' roles. Thus, given the business plan's generalities, and lack of applicable information, the petitioner cannot demonstrate whether the new office will support a manager or executive within one year of filing this petition.

In sum, the petitioner has not complied with the new office requirements because of the vague and nonspecific descriptions of the proposed office, the entity's projected scope, the new office's organizational structure, and organizational structure of the foreign entity. After careful consideration of the evidence, the AAO concludes the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily managerial or executive capacity. 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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.