

identifiable information used to
prevent unauthorized disclosure
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D 7

FILE: SRC 02 220 50981 Office: TEXAS SERVICE CENTER Date: JUN 14 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

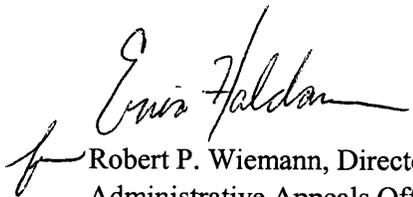
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Texas Service Center. The petitioner subsequently filed a motion to reopen and reconsider. The Director dismissed the motion and affirmed his decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, Tidwell Apartments, Inc., endeavors to classify the beneficiary as a manager or executive 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 claims to be an affiliate of Shaan Feeds Limited, located in Pakistan. It is engaged in the property management, leasing, and hotel business. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's director and president.

On January 15, 2003, the director denied the petition, determining that the petitioner failed to establish that a qualifying relationship existed between the U.S. and foreign entities.

The petitioner subsequently filed a motion to reopen and reconsider the director's denial. On February 22, 2003, the director dismissed the motion and affirmed her denial. This timely appeal followed. On appeal, counsel for the petitioner asserts that the petitioner "meets the qualifications of a qualifying organization." Counsel submits a brief and additional evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), 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)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) 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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the U.S. and foreign entities.

The regulation at 8 C.F.R. § 214.2(l)(ii) defines the term "qualifying organization" and related terms as follows:

(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 petitioner indicated on Form I-129 that it has an affiliate relationship with the foreign entity. On an attachment to Form I-129, the petitioner stated, "The Petitioner is now one hundred percent (100%) owned and controlled by [the beneficiary]." The petitioner also stated that the foreign entity is majority-owned and controlled by the beneficiary. In support of the petition, the petitioner also submitted (1) the U.S. entity's articles of incorporation, which indicate that it is authorized to issue 10,000 shares of stock; (2) stock certificate number 1001 for 6,000 shares issued to Shah, Inc. on January 31, 2001; (3) stock certificate number 1002 for 4,000 shares issued to the beneficiary on January 31, 2001; (4) a partially illegible stock certificate for Shah, Inc. indicating that 100 shares were issued to Akhtar Shah on March 5, 1993; (5) a statement from the petitioner's corporate secretary dated May 31, 2001, confirming that Shah, Inc. and the beneficiary own its stock in the above-stated proportions; (6) a certificate of shareholding from the foreign entity's secretary dated August 23, 2000, stating that beneficiary owns 12 shares of the Pakistan company, comprising 78 percent of its issued shares; and (7) the foreign company's memorandum and articles of association dated February 8, 1992, which lists the beneficiary as the owner of 78 shares out of 100 issued shares.

On July 24, 2002, the director requested additional evidence. In part, the director requested that the petitioner submit its 2001 Federal Income Tax Return with all attachments. In a response dated September 13, 2002, the petitioner included a copy of its 2001 Form 1120S, U.S. Income Tax Return

for an S Corporation for 2001. An attached Schedule K-1 indicated that the beneficiary owns 100 percent of the company's stock.

On October 1, 2002, the director issued a second request for evidence seeking to clarify the ownership of both companies. The director noted that the submitted stock certificates show that Shah, Inc. is the majority shareholder, while the petitioner claimed that the beneficiary owns 100 percent of the petitioner's stock. Accordingly, the director requested: (1) clear evidence that the foreign and U.S. entities have a qualifying relationship; (2) a copy of all stock certificates (front and back) for the United States entity; (3) a copy of the petitioner's stock registry; (4) an explanation regarding the petitioner's status as an S corporation, and evidence to establish that it is no longer an S corporation, if applicable; (5) a copy of all stock certificates (front and back) for the foreign entity; and (6) a copy of the stock registry for the foreign entity.

In a response dated January 2, 2003, the petitioner submitted the following explanation regarding its ownership:

[The petitioner] is owned by [redacted] (60%). This stock was formerly owned by [redacted] owned by [the beneficiary] (78%) Shah, Inc. does not exist any longer. The other owner of [the petitioner] is [the beneficiary] (40%).

[redacted] was owned by [redacted] (90%) and [redacted] (10%). It does not exist any longer

Since [the beneficiary] owns 78% [redacted] and 40% of [the petitioner] - which is owned 60% by [redacted] - he controls both the foreign entity and the U.S. subsidiary. Thus the statement that the petitioner is under the control of [the beneficiary], although it is not quite 100% in terms of stock ownership - only to indicate that it is under his complete control since he controls [redacted] which, in turn, controls [the petitioner].

[redacted] merely stepped into the shoes of [redacted]. The control remained the same since [redacted] was owned 90% [redacted]. There was no change in the relationship of the companies and control remained the same - with [redacted]

[redacted] The old stock certificates were cancelled and new ones issued. The shares [redacted] were transferred to [redacted] while the shares to [the beneficiary] remained the same, but a new certificates was issued to him.

The parent company [redacted] merely decided to eliminate a "go-between" corporation and take direct control of [the petitioner]. This minor change went into effect on October 1, 2002 - the beginning of the fourth quarter.

[The petitioner] is not an "S" corporation. We now realize that our corporate tax return for 2001 was filed on the wrong form and are taking steps to correct this.

In support of this statement, the petitioner submitted: (1) its stock certificate number one issued to Shaan Feeds for 6,000 shares on October 1, 2002; (2) its stock certificate number two issued to the beneficiary for 4,000 shares on October 1, 2002; (3) evidence that the formerly issued stock certificates, numbers 1001 and 1002, were canceled; (4) its stock transfer ledger; (5) a partially illegible stock certificate for [REDACTED] shares issued to [REDACTED] March 5, 1993; (6) a partially illegible stock certificate for Shah, Inc. showing 100 shares issued to Akhtar Shah on March 5, 1993; and (7) previously submitted documentation to show the ownership of the foreign entity. The petitioner explained that the foreign entity does not issue stock or share certificates.

On January 15, 2003, the director concluded that the petitioner failed to establish a qualifying relationship between the U.S. and the foreign entities. The director found that the petitioner failed to establish the ownership of the U.S. entity and noted that the record contained unresolved conflicting information as to how the two entities are related. Consequently, the director denied the petition.

The petitioner subsequently filed a motion to reopen and reconsider the director's denial. The petitioner submitted its amended 2001 Form 1120, U.S. Corporation Income Tax Return, filed on January 23, 2003.

On February 22, 2003, the director dismissed the motion and affirmed her denial. The director found that at the time of filing, the petitioner failed to establish that the U.S. and foreign entities had a qualifying relationship.

On appeal, counsel for the petitioner asserts that the petitioner "meets the qualifications of a qualifying organization." Counsel asserts the following: 1) the beneficiary has always been in control of the foreign and U.S. entities; 2) three precedent decisions support the assertion that the petitioner has a qualifying relationship with the foreign entity; 3) the U.S. company's tax return was filed with the Internal Revenue Service which establishes that the petitioner made an error; and, 4) typographical or "procedural" errors that result in a denial may be corrected.

Counsel's assertions are not persuasive. Upon review, there is insufficient evidence on record to establish that a qualifying relationship exists between the petitioner and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G).

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.*

In the present matter, the petitioner has submitted only minimal evidence to establish the ownership and control of the U.S. entity, and what little evidence submitted has been conflicting. Initially, the petitioner stated on the attachment to Form I-129 that it "is *now* one hundred percent (100%) owned and controlled by" the beneficiary, which would seem to suggest a change in ownership since the previous L-1 petition filing. At the same time, the petitioner submitted stock certificates indicating that another U.S. company [REDACTED] was the majority owner of the petitioner's shares. The petitioner's 2001 Form 1120S submitted in response to the first request for evidence also stated that the beneficiary was the sole shareholder of the company. In response to the director's second request for evidence, the petitioner indicated that the company was never wholly owned by the beneficiary and claimed that the Form 1120S indicating him as the sole shareholder was in error. The petitioner then claimed that [REDACTED] a subsidiary of [REDACTED] no longer exists, and that its shares were transferred to Shaan Feeds on October 1, 2002. On appeal, the petitioner submits its amended Form 1120, U.S. Corporate Income Tax Return, which states that Shaan Feeds owns 60 percent of the U.S. company. However, this document does not cure the many deficiencies in the record with respect to the U.S. company's ownership. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner has not adequately explained why it initially indicated on the attachment to Form I-129 that the company "is now one hundred percent (100%) owned and controlled" by the beneficiary, nor has it adequately explained the claimed "error" in its initial self-prepared income tax return. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Based on the petitioner's later representations, the U.S. company was owned by another U.S. company [REDACTED] at the date of filing. Although the petitioner claims that this company was a majority owned subsidiary of the foreign entity, thus making the petitioner an indirect subsidiary,

it has not submitted sufficient evidence to substantiate this claim. The petitioner submitted a partially illegible share certificate showing that the foreign entity owned 900 shares of Shah, Inc. as of March 1993. The share certificate contains no legible certificate number, nor does it indicate how many shares the company was authorized to issue. This document is inadequate to establish that the foreign entity held a majority of shares in [REDACTED] of July 2002, when the instant petition was filed. In addition, the petitioner repeatedly stated [REDACTED] no longer exists, but has failed to indicate when the company was dissolved. Without this information, it is impossible to determine whether the company even existed at the date of filing. 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)). Based on the conflicting claims regarding the petitioner's ownership at the time of filing, and the petitioner's failure to document the ownership of Shah, Inc., the petitioner has not established that the U.S. entity was a subsidiary of the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(K).

The AAO recognizes the petitioner's attempts to show that the foreign entity now directly owns the majority (60 percent) of the petitioner's shares. 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).

Nor has the petitioner established that the U.S. company is an affiliate of the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L). The petitioner claims that the beneficiary is the majority owner of the foreign entity, and that he has direct and indirect majority ownership and control over the U.S. entity. As already discussed above, the petitioner has not provided clear and consistent evidence to establish the ownership of the United States entity, thus it is impossible to find an affiliate relationship based on common ownership and control. However, it is noted for the record that the petitioner has not established that the beneficiary is the majority shareholder of the foreign entity. Based on the documents submitted, it appears that he owned 78 out of 100 issued shares as of February 8, 2002, as reported on page 38 of the foreign entity's memorandum and articles of association. However, the "certificate of shareholding" issued by the foreign entity's secretary in August 2000 indicates that the beneficiary "is the owner of 12 shares of Shaan Feeds Ltd. Which Comprises of 78% of outstanding shares." Clearly, the beneficiary could not reduce his shareholding by 66 shares and still hold 78 percent of the outstanding shares of the foreign entity. Rather, if the beneficiary owned 12 shares, his percentage of ownership would be 12 percent, assuming the total number of shares did not increase. This conflicting evidence has not been resolved. The petitioner has not established that the beneficiary was the majority shareholder of the foreign entity at the time the petition was filed.

The AAO recognizes counsel's submission of three precedent AAO decisions on appeal to stand for the proposition that a high degree of ownership and control between organizations is sufficient to establish a qualifying relationship for L-1 visa purposes. Specifically, counsel cites *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1981); *Matter of Hughes*, 18 I&N Dec 289 (Comm. 1982); and *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988). Counsel's reliance on these decisions is not persuasive in the instant matter. As discussed

above, the petitioner has failed to submit sufficient evidence to document its claims regarding the key elements of ownership and control of the U.S. and foreign entities.

Counsel further refers to an unpublished decision in which the AAO determined that the petitioner satisfied the qualifying relationship requirement for L-1 classification even though there was a typographical error in the company's corporate documentation that initially resulted in a denial on this issue. Counsel has provided a copy of the decision, but has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision, other than stating that the petitioner's initial filing of a Form 1120S rather than a Form 1120 was a similar type of error. As already stated above, the many deficiencies in the petitioner's evidence are not cured by its submission of the amended tax return. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

After careful consideration of the evidence, the AAO concludes that the petitioner has not established that a qualifying relationship exists between the United States and foreign entities. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO is not persuaded that the beneficiary has been or will be employed in a managerial or executive capacity as defined at sections 101(a)(44)(a) or (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) or (B). The petitioner has provided a broad description of the beneficiary's U.S. duties. For example, the petitioner described the beneficiary's duties as "setting and establishing the company's goals and objectives," "overseeing all operations," and "reviewing and analyzing market conditions." The petitioner did not, however, describe the goals or objectives that the beneficiary will perform for the U.S. entity, or describe any specific duties involved in "overseeing" the petitioner's operation. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). 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. In addition, although requested by the director, the petitioner failed to provide job descriptions for the beneficiary's subordinates. Thus, although four of the subordinates have managerial, supervisory, or professional personnel, without job descriptions, the AAO cannot conclude that the beneficiary actually supervises managerial, supervisory, or professional personnel or, that the subordinate staff is sufficient to relieve the beneficiary from performing non-qualifying duties. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. §103.2(b)(14). For this additional reason, the petition may not be approved.

Another issue in this proceeding, also not raised by the director, is whether the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a

greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary is the owner of the petitioning organization, and the majority owner of the foreign entity. The petitioner claimed, “the control of both the foreign entity and the U.S. entity is firmly in the hands of one person – [the beneficiary].” On the petition, the petitioner also indicated that the beneficiary’s services would be required for two years. No evidence of the claim was provided. In the absence of persuasive evidence, it cannot be concluded that the beneficiary’s services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of the position in the United States. Therefore, the petition may not be approved on this basis as well.

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).

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.