

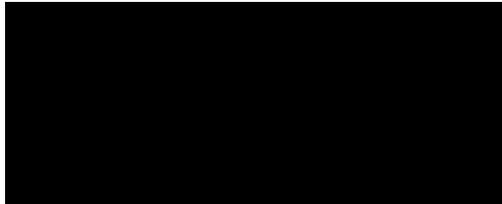
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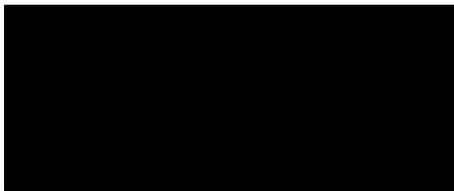
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FILE: EAC 00 275 51560 Office: VERMONT SERVICE CENTER Date: **NOV 28 2005**

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

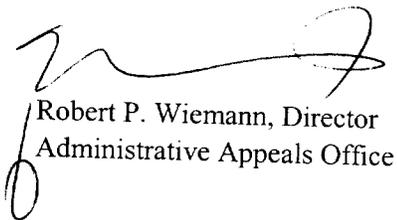
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal. The matter is now before the AAO on motion to reopen. The motion will be granted and the previous decision of the AAO will be affirmed.

The petitioner states that it is engaged in the import and retail sale of jewelry. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive director 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 Virginia corporation, claims to be a subsidiary of Bansal Jewelers, located in Delhi, India. The beneficiary was initially granted a one-year period of stay in L-1A status in order to open a new office in the United States and the petitioner now seeks to extend his stay.

The director denied the petition on February 16, 2001, concluding that the petitioner failed to establish that the beneficiary would be employed in a managerial or executive capacity.

On appeal, the AAO affirmed the decision of the director in a decision dated October 15, 2002. The AAO also observed that the evidence on record did not demonstrate that (1) the beneficiary's services would be for a temporary period or that the beneficiary would be transferred abroad upon completion of the assignment as required by 8 C.F.R. § 214.2(l)(3)(vii); or that (2) the petitioner has a qualifying relationship with the beneficiary's foreign employer pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G).

On motion, counsel submits a brief statement and additional evidence to address the grounds of the director's denial and the findings of the AAO.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

The Form I-129 petition was submitted on September 8, 2000 with insufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity. The petitioner provided only a brief description of the beneficiary's duties during the first year of operations, and indicated that the beneficiary's wife, an unsalaried shareholder, was solely responsible for selling jewelry and maintaining the store. The petitioner stated that it did not have any payroll employees.

On October 25, 2000, the director requested additional evidence in support of the petitioner's claim that the beneficiary would be employed in a managerial or executive capacity, including in part a comprehensive description of the beneficiary's duties, an organizational chart depicting all of the petitioner's employees, and descriptions of the duties performed by the beneficiary's subordinates. The petitioner, through former counsel, submitted evidence that it hired two employees subsequent to the filing of the petition, brief descriptions of their duties, and a new description of the beneficiary's duties. As the beneficiary's job description was quoted in its entirety in the AAO's previous decision, it will not be repeated here.

The director denied the petition on February 16, 2001 concluding that the petitioner had not established that the beneficiary had been and would be employed in a primarily executive or managerial capacity. The director observed that the evidence submitted indicated the beneficiary had been and would be engaged primarily in non-managerial, day-to-day operations involving producing a product or providing a service.

On appeal, former counsel for the petitioner asserted that the director failed to consider the job description provided in response to the petitioner's request for evidence "detailing his duties vis-à-vis executive functions in contrast to the duties of its two regular staff employees." The AAO dismissed the appeal, noting that the petitioner's descriptions of the beneficiary's duties were too broad and general, and that the record contained no indication of the beneficiary's actual duties. The AAO also found no evidence that the beneficiary would manage a staff of professional, managerial or supervisory personnel and concluded that he would be acting, at most, as a first-line supervisor of non-professional employees.

On motion, counsel for the petitioner does not specifically address the issues raised in the AAO's decision. Rather, counsel merely states:

The prior counsel misstated the beneficiary's duties. Actually, he was performing these duties while setting up the business. The job description for his position as a Manager is as follows:

Manager – Directs Sales, Export and Import of Jewelry. Formulates pricing policies of Jewelry according to profitability of store operations. Coordinates sales promotion activities and prepares or directs workers preparing merchandise displays, supervises employees engaged in sales work. Taking inventories, Reconciling Cash and Sales Receipts. Plans and prepares work schedules and assigns employees to specific duties.

The job is a combination of job of Export Manager, Sales Manager, Retail Store Manager and General Manager all in one. In a small business enterprise, there has to be a lot of flexibility. The Manager has to wear many hats, and sometimes he has to substitute for employee too.

Counsel cites several unpublished AAO decisions to stand for the proposition that CIS is required "to look at the increase in the number of employees, significant growth in cash flow, presence of significant customers and clientele or similar elements in order to determine the need of Managerial or Executive Employee." Counsel states that the petitioner's "cash flow is growing everyday as is indicated by its sales. The sales are much higher in 2001 than in 2000 and 1999. Its clientele or base of customers is increasing and thus it needs the services of the beneficiary." The petitioner provides copies of its Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return, for the years 1999, 2000 and 2001 and "payroll deductions" for the 2001 and 2002 years. Finally, counsel asserts that the Immigration Act of 1990 "liberalized" the definitions of managerial and executive capacity, and no longer requires beneficiaries to have supervisory responsibilities. Counsel concludes that the beneficiary is performing "all the managerial duties" while other employees perform the day-to-day functions.

Counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's job 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 in an executive or managerial capacity. *Id.*

Counsel has provided no additional evidence on motion to persuasively demonstrate that the beneficiary would be employed in a managerial or executive capacity. Rather, the new job description, which counsel

claims represents the beneficiary's "actual" duties, supports the director's and the AAO's previous conclusions that the beneficiary primarily performs routine operational tasks, such as taking inventory and reconciling cash register receipts, and directly performing sales tasks, as well as first-line supervisory duties over low-level staff. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). 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. *Id.*

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Where an individual is primarily performing the tasks necessary to produce a product or to provide a service, that individual cannot also primarily perform managerial or executive duties. In the instant matter, the petitioner has failed to show that non-qualifying duties will not constitute the majority of the beneficiary's time.

Counsel correctly states that the Immigration Act of 1990 removed the requirement that a managerial or executive employee directly supervise personnel. However, counsel does not submit evidence or argument to establish that the beneficiary qualifies as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). Based on the petitioner's representations, the beneficiary devotes a substantial proportion of his time to supervisory responsibilities. 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. As discussed in the AAO's previous decision, the beneficiary has not established that the beneficiary has authority beyond that of a first-line supervisor of non-professional personnel.

Counsel correctly states that the AAO will take into account certain factors, such as an increase in the number of employees, a significant growth in cash flow or the presence of significant customers in determining the need for a managerial or executive employee once a business becomes operational. However, the AAO need not and will not consider evidence of business growth or expansion that occurred subsequent to the filing of the petition. 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, and does not have sufficient subordinate staff to relieve the beneficiary from performing non-qualifying duties, the petitioner is ineligible by regulation for an extension. Therefore, the AAO will not consider evidence of the petitioner's staffing levels or sales figures for the 2001 and 2002 years. The record indicates that as of the date of filing, the beneficiary and his spouse were still solely responsible for all aspects of the petitioner's business. Accordingly, the petitioner has not reached the point

that it can employ the beneficiary in a predominantly managerial or executive position. The petitioner has not submitted evidence on motion to overcome the AAO's previous decision on this issue.

The second issue in this proceeding is whether the petitioner has established that the beneficiary's employment will be for a temporary period.

Generally, the petitioner for an L-1 nonimmigrant classification needs to 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). As noted in the AAO's previous decision, the record indicates that the beneficiary is a 50 percent owner of the petitioning organization. The petitioner did not furnish evidence that the beneficiary's services are for a temporary period or that the beneficiary will be transferred abroad upon completion of the assignment.

On motion, counsel simply asserts that the statute does not require evidence that the beneficiary's services will be for a temporary period or evidence that the beneficiary will be transferred abroad upon completion of his assignment. The petitioner has not submitted any additional evidence in compliance with the requirements at 8 C.F.R. § 214.2(l)(3)(vii). Counsel's contention that such a requirement does not exist, when the requirement is stated in the plain language of the regulations, is not persuasive. The petitioner has failed to overcome the AAO's determination on this issue. For this additional reason, the petition may not be approved.

The third and final issue in this proceeding is whether the petitioner has established a qualifying relationship between the U.S. company and the foreign entity.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define 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 operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
  - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
  - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner indicated on Form I-129 Supplement E/L that the United States company is a subsidiary of the foreign entity and explained:

Both companies family owned: Alien owns overseas branch with his brother from '84 to '92 and thereafter alone until March '99 when he left for U.S. (His wife's brother manages the business to date in which he and alien are equal [partners]. U.S. business is 100% owned by alien & wife.

The record includes the following documents with respect to the foreign entity's ownership: (1) a partnership deed for the foreign entity dated July 20, 1984, listing the beneficiary and his brother as 50-50 partners; (2) a dissolution deed confirming that the beneficiary's brother left the partnership on December 30, 1994; and (3) an affidavit executed by the beneficiary on September 9, 1999, which indicates that his brother-in-law became a partner in the foreign entity in March 1999, and that his brother-in-law currently manages the foreign entity. The record also contains the petitioner's stock certificates numbers one and two, confirming that the beneficiary and his spouse each own ten shares of stock in the company.

Although the director did not address this issue in his decision, the AAO noted that the petitioner did not submit evidence to establish that it is a subsidiary of the foreign entity, as claimed on the Form I-129 supplement. The AAO further observed that the petitioner indicated that the beneficiary alone owns the foreign entity, while the U.S. entity is owned by the beneficiary and his spouse, and concluded: "Given this

evidence, it is apparent that there is no qualifying relationship between the petitioner and the foreign entity pursuant to 8 C.F.R. 214.2(l)(1)(ii)(G).”

On appeal, counsel objects to the AAO’s findings and asserts:

The law does not say that the U.S. entity has to be a subsidiary of the foreign entity. A Majority of stock ownership in both companies is sufficient (Matter of Tessel). Less than majority ownership, but control, may be sufficient. (Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982). It is a matter of fact that the beneficiary is a majority owner for both the entities. Thus, there is a qualifying relationship between the two companies.

Counsel’s assertions are not persuasive. Upon review of the previous decision, the AAO acknowledges that this office could have offered a clearer explanation for finding the petitioner’s evidence deficient. However, the petitioner has not submitted evidence on motion to establish that the U.S. entity and the foreign entity have the requisite qualifying relationship.

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 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.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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.*, I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner claims that the beneficiary owns 50 percent of the foreign entity, but has failed to provide any supporting documentation to establish the current ownership and control of the company. The petitioner did not submit a copy of the foreign entity’s current partnership deed, which would establish the beneficiary’s actual percentage of ownership and degree of control in the foreign partnership at the time this petition was filed. In addition, the petitioner’s statement that the beneficiary’s partner actually manages the foreign entity suggests that the beneficiary does not exercise “de facto” control over the entity. 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)). Absent this essential documentation, the AAO is unable to determine whether the United States and foreign entities possess the claimed affiliate relationship.

Although counsel also cites on appeal that *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) determined that a majority stock ownership in both companies is sufficient for the purposes of establishing a qualifying relationship, counsel has misconstrued the decision. In the *Tessel* decision, the beneficiary owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management . . . ." It was further determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Id.* at 633. The facts in the present matter can be distinguished from *Matter of Tessel* because no one shareholder holds a majority interest in either corporation. The record, therefore, fails to demonstrate that there is a high percentage of common ownership and common management between the two companies.

The petitioner has not submitted sufficient evidence to establish a qualifying relationship between the United States and foreign entities. For this additional reason, the petitioner may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 previous decision of the AAO will be affirmed, and the petition will be denied.

**ORDER:** The decision of the AAO dated October 12, 2002 is affirmed.