

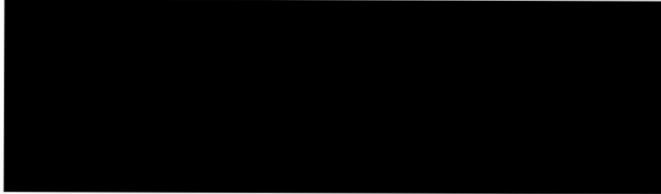
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U.S. Citizenship  
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Services

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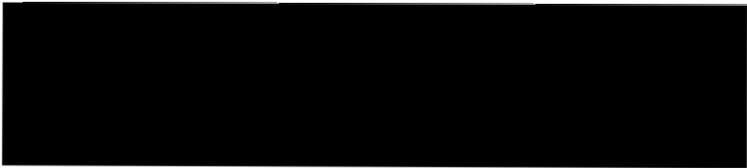
APR 03 2006

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)

IN 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a jewelry and perfume company organized in the State of Texas, seeks to employ the beneficiary as its director of business development. The petitioner claims that it is the subsidiary of [REDACTED], located in Mumbai, India. The petitioner seeks to employ the beneficiary in the United States to open a new office.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity for the petitioner.

Counsel for the petitioner filed an appeal in response to the denial. On appeal, counsel asserts that ample evidence was submitted to establish the beneficiary's qualifications and that the director made a serious and fundamental factual error in denying the petition.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

- (v) If the petition indicates that 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; and
  - (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 primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity for the petitioner.<sup>1</sup>

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,

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<sup>1</sup> As will be discussed later in the decision, a more appropriate question on appeal is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner submitted a Rider to the Form I-129 which described the beneficiary's proposed duties as follows:

- Be responsible for the expansion of [the petitioner];
- Plan and develop the US investments, analyze market trends, set strategic planning goals and be responsible for the sales efforts of the Company;
- Responsible for operating the business in all the material aspects including payment of all debts, payment of employee salaries, employees taxes, and keeping the business and its activities in full compliance with all licensing regulations;
- Responsible for formulating policies regarding sales and marketing;
- Responsible for hiring and firing personnel in the sales and marketing department;
- Oversee the sales and invoicing of products and receipt of payments in a timely manner;
- Oversee new investment activities, including reviewing proposals and exploring viable business ventures;
- Review and analyze activities, costs, and forecast data to determine progress toward stated goals and objectives;
- Discuss with management and employees to review achievements and discuss required changes in goals or objectives of the company.

The petitioner also submitted a functional flowchart which demonstrated the beneficiary's claimed executive duties. With regard to the petitioning entity, counsel submitted corporate documentation establishing that the

petitioner was incorporated on February 11, 2004 and thus qualified as a new office.<sup>2</sup> The record further indicated that the petitioner would operate a retail outlet known as “The Jewelry Box.”

In addition, the director noted that the petitioner submitted evidence of a joint venture between the foreign parent and another company, whose business endeavors included additional retail outlets in the United States operated by another corporate entity, namely, [REDACTED]. According to the petitioner, this corporation operated three retail outlets: (1) [REDACTED] (2) [REDACTED] and (3) [REDACTED]. Numerous documents and forms of evidence pertaining to Texas Nehal’s operations and the operations of its retail outlets was also submitted.

After noting the significant documentation and details regarding this separate corporation and its three enterprises, the director issued a request for additional evidence on March 2, 2004. The request specifically required the petitioner to clarify the nature of the beneficiary’s proposed duties as they pertained to the petitioner and observed that the majority of the evidence submitted related to services he would perform for [REDACTED]. In a response dated March 22, 2004, the petitioner submitted additional evidence accompanied by an explanation from counsel of the manner in which the beneficiary would be employed. Counsel clarified that the beneficiary’s responsibilities would include the business development of all four stores, and not just the one owned and operated by the petitioning entity. Also submitted was a more precise breakdown of the beneficiary’s duties, which is set forth below:

- Be responsible for the expansion of the U.S. side of the joint venture business (i.e., [the petitioner] and [REDACTED]) (15% of the time);
- Plan and develop the US investments, analyze market trends, set strategic planning goals and be responsible for the sales efforts of the U.S. business operations (15% of the time);
- Responsible for operating the U.S. business operations with respect to business development and in all other related material aspects including payment of all debts,

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<sup>2</sup> The AAO notes that the director did not discuss the infancy of the petitioner in her decision, nor was the new office analysis applied in this matter. The AAO notes that counsel asserts that the petitioner was a new office in both the response to the request for evidence and on appeal. Since the petitioner was incorporated on February 11, 2004 and as this petition was filed on February 24, 2004, the petitioner could not have been doing business in the United States for one year or more and thus met the definition of new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F). It should also be noted, however, that the petitioner erred when it specifically indicated that the beneficiary would *not* be coming to the United States to open a new office. For future reference, it should be noted that 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).

<sup>3</sup> It is noted that the director incorrectly stated in the request for evidence that the beneficiary would be working for a “shoe store.” While the AAO notes that the evidence clearly indicated that the petitioner would be operating a jewelry store (which counsel verified in response to the request for evidence), the petitioner’s position is that the beneficiary would be rendering his services in the United States to all four of the retail stores named above, and not just the [REDACTED] operated by the petitioner.

payment of employee salaries, employees taxes, and keeping the business and its activities in full compliance with all licensing regulations **(15% of the time)**;

- Responsible for formulating policies regarding sales and marketing for the entire U.S. joint venture **(15% of the time)**;
- Responsible for hiring and firing subordinate personnel in the sales and marketing functions of the U.S. business operations **(5% of the time)**;
- Oversee the sales and invoicing of products and receipt of payments in a timely manner **(10% of the time)**;
- Oversee new investment activities, including reviewing proposals and exploring viable business ventures **(15% of the time)**;
- Review and analyze activities, costs, and forecast data to determine progress toward stated goals and objectives of the U.S. joint venture operations **(5% of the time)**;
- Discuss with management and employees of the entire U.S. business operations to review achievements and discuss required changes in goals or objectives of the company **(5% of the time)**.

In addition, the petitioner submitted an organizational chart which indicated that the proposed staffing of the U.S. entity was to include a president to oversee the beneficiary, the beneficiary as the director of business development, and a store manager and finance manager to work below the beneficiary. Furthermore, a Projected Income Statement for the petitioner was submitted, which indicated that the petitioner would operate a seasonal business and conduct at least 50% of its business during the months of November and December.

On April 2, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity for the petitioner. Specifically, the director concluded that the evidence submitted appeared to pertain more to the three companies run through the joint venture agreement and not specifically to the petitioning entity.

On appeal, counsel for the petitioner restates the beneficiary's qualifications and resubmits the evidence submitted in response to the request for evidence, as well as the copy of its commercial lease submitted with the petition. Counsel asserts that the director's decision was a fundamental factual error, and alleges that adequate documentation of the petitioner's enterprise, namely, the [REDACTED] store, was submitted for the record.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. However, before this question can be addressed, the corporate structure of the U.S. petitioner and its related entities must be discussed.

The petitioner claims to be the subsidiary of [REDACTED] which appears, as evidenced by the share certificates provided, to own a majority interest in the U.S. petitioner. The record indicates that [REDACTED] entered into a joint venture agreement with [REDACTED] on January 20, 2003. According to the evidence submitted for the record [REDACTED] is the majority owner of [REDACTED] a Texas corporation

incorporated in 2003. [REDACTED] in turn, allegedly operates three retail outlets [REDACTED] and [REDACTED]. Paragraph 8 of the joint venture agreement between the foreign parent and [REDACTED] authorizes the beneficiary to carry out the business dealings of [REDACTED] abroad, particularly in the United States.

The joint venture agreement discussed above, while certainly an example of the responsibility bestowed on the beneficiary abroad, is irrelevant in this matter. The question before the AAO is whether the beneficiary, who the petitioner wishes to bring to the United States to open a new office, will be employed in a managerial capacity for *the petitioner*. The evidence provided lists the tasks and responsibilities the beneficiary has been performing for Texas Nehal through the authorization provided in the joint venture agreement. The director recognized that the evidence submitted focused on the beneficiary's existing duties to Texas Nehal, and asked the petitioner to provide specific evidence of the beneficiary's proposed duties for the petitioner named in the instant matter. Counsel's response, both on appeal and in response to the request for evidence, continually asserts that the beneficiary oversees four retail stores and the subordinate staff employed therein, and thus qualifies as a manager or executive. Texas Nehal, however, is not the petitioner, and the obligations the beneficiary has to that entity are irrelevant for purposes of granting the beneficiary L-1 status on behalf of the petitioner in this matter, who is a separate and distinct corporate entity. The AAO, therefore, will focus exclusively on the evidence pertaining to the petitioner and its parent-subsidary relationship with Recardo Garments.

As counsel repeatedly asserted, the petitioner in this matter was incorporated on February 11, 2004. Since the petition was filed on February 24, 2004, barely two weeks after the petitioner's incorporation, the petitioner will be treated as a new office. *See* 8 C.F.R. § 214.2(l)(1)(ii)(F).

The regulation at 8 C.F.R. (l)(3)(v) states that if the petition indicates that 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; and
- (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 only evidence initially submitted which pertained to the U.S. petitioner included stock certificates showing its two alleged owners, an application for an Employer Identification Number, a lease agreement, and wire transfers showing the transfer of approximately \$21,000 to the U.S. entity. In response to the request for evidence, a projected income statement for the petitioner was submitted through 2008. This statement indicated that the petitioner's business was seasonal, with half of its sales generated in November and December.

With regard to his duties, counsel for the petitioner repeatedly asserts that the beneficiary will exercise responsibility over four retail outlets, including supervision of staff and generation of policy. However, both counsel and the petitioner ignore the fact that three of these retail outlets are operated by a separate and distinct corporate entity, and not by the petitioner. While the parent company may indeed have a relationship with these other entities, whether the beneficiary has been managing these entities and whether he would be legally authorized to do so is not relevant for purposes of determining eligibility for L-1 status. The key question to be resolved in this matter is whether *the petitioner's* intended United States operation, within one year of the approval of the petition, will support an executive or managerial position and whether the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity.

Counsel and the petitioner continually focus on the beneficiary's vast responsibilities to [REDACTED] and its retail outlets who are not named as petitioners in this matter. They fail, however, to provide convincing evidence that the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity and the petitioner will support a primarily managerial or executive position after the first year of operations. As noted previously by the director, there is no evidence of any undertaking by the petitioner, other than the application for an employer identification number, to commence business operations. The petitioner has not applied for a trade name for the [REDACTED] which it alleges will be its base of operations, nor has it provided a comprehensive business plan for the upcoming year. No explanation of necessary permits or licenses has been discussed. Furthermore, the lease agreement submitted for the record indicates that the petitioner will share office space with [REDACTED]. As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of

materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

*Id.*

No credible details have been submitted, other than the petitioner expects to generate \$340,000 in sales during the first year of operations. Also interesting is the claim that the beneficiary will oversee a store manager and a finance manager, both of whom are named in the petition, yet there is no evidence to show that any attempts to commence operations have been undertaken or that these staff members have actually been hired. 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)). Furthermore, without documentary evidence to support such claims, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, while counsel and the petitioner repeatedly rely on the beneficiary's executive and managerial authority over [REDACTED] three existing retail outlets, they fail to explain how the beneficiary will continue these stated duties while commencing the petitioner's new business and ascertaining the need for a managerial and/or executive position by the end of the first year. 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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.

Even though the enterprise is in a preliminary stage of organizational development, the petitioner is not relieved from meeting the statutory requirements. Based on the limited documentation furnished, it cannot be

found that the beneficiary will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the petitioner and [REDACTED] the claimed foreign parent. 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.

In this matter, the only evidence of [REDACTED] majority interest in the U.S. petitioner is a stock certificate, showing that it owns 510 shares, or 51% of the corporation. 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.* 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition may not be approved.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. 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).

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.

**ORDER:** The appeal is dismissed.