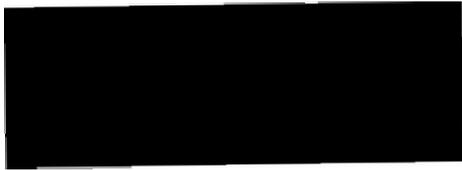




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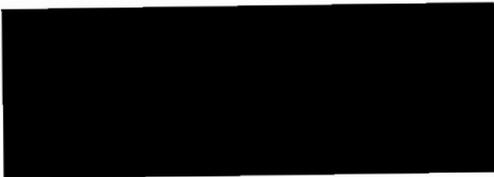
D-7

File: SRC 04 233 53462 Office: TEXAS SERVICE CENTER Date: **JUL 18 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)

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, Chief  
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 withdraw the director's decision and remand the petition to the director for further action and consideration and entry of a new decision.

The petitioner seeks to employ the beneficiary temporarily in the United States 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 is a corporation organized in the State of Georgia and authorized to conduct business in Texas. It states that it provides goods and services to the oil and gas industry. It claims to be an affiliate of [REDACTED]. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a three-year period.

The director denied the petition, determining that the petitioner did not establish: (1) that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; or (2) that the U.S. and foreign entities have a qualifying relationship. The director also found insufficient evidence to demonstrate that the petitioner had a valid lease for its office space. The director determined that the petitioner did not qualify as a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) and therefore did not apply the regulations at 8 C.F.R. § 214.2(l)(3)(v) in adjudicating the petition.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner contends that the director erred in determining that the petitioner does not qualify as a "new office." Counsel emphasizes that although the petitioner was incorporated in 1998 and has an active U.S. banking account, it has not commenced business operations in the United States. Counsel asserts that all issued stock certificates for the U.S. company have been submitted, contrary to the director's assumption that the petitioner must have issued stock prior to 2004. Finally, counsel contends that the lease agreement submitted in support of the petition was valid. Counsel submits a brief and additional evidence in support of the appeal.

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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves 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.

As a preliminary matter, the AAO will address whether the petitioner qualifies as a "new office." The term "new office" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(F) as an organization which has been doing business in the United States through a parent, branch, affiliate or subsidiary for less than one year.

The term "doing business" is defined at 8 C.F.R. § 214.2(l)(ii)(H) as the regular, systematic and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner indicated on Form I-129 that the beneficiary is coming to the United States in order to open a new office. The petitioner submitted evidence that the U.S. company was incorporated in the State of Georgia on February 25, 1998 and authorized to transact business in the State of Texas on May 25, 2004. The petitioner stated in its accompanying June 3, 2004 letter that the beneficiary would establish the petitioner's new office in Texas. The petitioner's supporting evidence included copies of the U.S. company's bank statements for the period January 2003 through April 2004.

The director requested additional evidence on September 14, 2004, advising the petitioner as follows:

Although the beneficiary wishes to open a new office in Texas, this petition is not for a new office as contemplated in the regulations. The company . . . was incorporated in the United States in 1998 and as such must show that it can support a managerial or executive position as defined in the regulations.

The director instructed the petitioner to submit, in part: (1) copies of its 2002 and 2003 IRS Forms 1120, U.S. Corporation Income Tax Return; (2) copies of 2003 Forms W-2 as evidence of employees; and (3) proof of business being conducted by the company in Georgia, including a copy of its business license.

In a September 27, 2004 letter submitted in response to the director's request, the petitioner stated:

[The petitioner] was chartered [sic] in 1998 to do business in the Oil and Gas supply industry. Circumstances changed and we decided to postpone the opening of our new office. The company is currently preparing to open a new office and commence business in Houston, Texas. However, the company never has engaged in business from its incorporation to date. The company has never had employees and has never filed Federal income tax returns. The company has never had an office, other than its recently acquired office space in Houston, Texas. In summary, the company has existed only "on paper" from its inception until present time.

Counsel for the petitioner explained that the U.S. company was unable to provide much of the requested documentation and stated that the company qualified as a new office as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F), as it had not yet begun to do business in the United States.

The director denied the petition on November 8, 2004. The director acknowledged the petitioner's statements that the company had not yet commenced business operations, but noted that the company submitted bank statements dating from January 2003, showing that the company had an active business checking account. The director concluded: "Obviously the company is doing business, even if it is not selling goods or services. While no determination can be made on what business is being conducted, it is clear that the company cannot be found to qualify as a new office." The director therefore did not apply the regulations applying to new office petitions when determining that the beneficiary would not be employed in a managerial or executive capacity in the United States, noting that "the U.S. company has been in business since 1998 but still does not have a subordinate staff of professional, managerial or supervisory personnel to relieve the beneficiary from performing non-qualifying duties."

On appeal, counsel for the petitioner asserts that the petitioner has not commenced doing business in the United States and therefore qualifies as a new office for L-1 purposes. Counsel contends that the director “willfully disregarded the regulations” and disregarded the petitioner’s September 27, 2004 letter. Counsel further asserts:

In our view, a company’s possession and use of a bank account cannot be construed as “doing business” as that term is defined by the regulation noted above. The applicable test of a company’s doing business for L-1 purposes is whether or not the entity in question has provided goods and/or services to its clients or customers. . . . And as the [director] concedes that the petitioner is not providing goods and/or services to the public, he must conclude, as a matter of law, that the petitioner is not doing business as that term is defined by the applicable regulation, and that the petitioner’s office is a new office situation, as that term is defined by the regulation cited above.

Upon review, the AAO concurs with counsel’s assertions and will withdraw the director’s November 8, 2004 decision. The director had insufficient basis to determine that the petitioner did not qualify as a “new office” as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). Contrary to the director’s determination, the possession of an active checking account, without more, does not serve as *prima facie* evidence that a petitioner is doing business as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(G). The director’s conclusion that the company is doing business, “even if not selling goods or services,” is contrary to the regulatory definition.

The AAO therefore concludes that the instant petition should have been adjudicated under the regulations pertaining to new office petitions at 8 C.F.R. § 214.2(l)(3)(v). The director’s failure to recognize that the petitioner qualifies as a “new office” consequently led to a flawed analysis of the beneficiary’s proposed employment in a managerial or executive capacity. The one-year “new office” provision is an accommodation for newly established enterprises, provided for by CIS regulation, that allows for a more lenient approach to petitions filed on behalf of managers or executives that are entering the United States to open a new office. Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a “new office,” it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a “new office,” a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

Although, the director’s decision will be withdrawn, the AAO finds insufficient evidence to establish the petitioner’s and beneficiary’s eligibility for this visa classification under the “new office” regulations at 8 C.F.R. § 214.2(l)(3)(v). Accordingly, the petition will be remanded to the director for further action and entry of a new decision in accordance with the following discussion.

The record as presently constituted does not contain sufficient evidence to establish that the beneficiary would be employed in a primarily managerial or executive capacity within one year of the approval of the petition. 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner provided only a vague position description for the beneficiary that

fails to specify the actual managerial or executive duties to be performed by him on a day-to-day basis as president of the petitioner's new office in the United States. 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).

The petitioner should be instructed to submit a comprehensive description of the beneficiary's proposed duties, including the percentage of time he will devote to each duty on a weekly basis, and a description of the beneficiary's "typical day." If the petitioner states that the beneficiary will "direct," "manage," "oversee," or "supervise" an aspect of the petitioner's business, it should clarify who would perform non-qualifying duties associated with the activity or function.

Furthermore, in order to establish that the U.S. company will be capable of supporting the beneficiary in a managerial or executive position within one year of approval of the petition, the petitioner is required to submit evidence regarding the proposed nature of the office, describing the scope of the entity, its organizational structure, and its financial goals, and evidence regarding the size of the United States investment. *See* 8 C.F.R. §§ 214.2(l)(3)(v)(C)(2) and (3).

The record contains no description of the type of business to be operated by the petitioner, no business plan outlining the proposed scope, nature and objectives of the organization, no evidence regarding the types of positions to be filled during the first year of operation, and no evidence of the size of the investment in the U.S. company. The director is instructed to request further evidence to establish that the beneficiary will be employed in a primarily managerial or executive position by the end of the first year of operations. The petitioner should provide a business plan providing specific dates for each proposed action for the next two years, beginning with the filing date of this petition. The business plan should document the anticipated volume of business, gross income predictions and staffing issues.

If not included in the business plan, the petitioner should provide a hiring plan outlining when it intends to staff each of its open positions. The petitioner should also provide job duties and educational requirements for each position, and indicate whether the beneficiary's subordinates will be employed on a full-time, part-time or commissioned basis. The evidence submitted should establish who will be responsible for performing the petitioner's administrative, clerical and operational functions, including, if applicable, market research, marketing, advertising, purchasing, sales, customer service, administrative and clerical tasks and any other functions inherent to the type of business to be operated by the petitioner.

In addition, the record as presently constituted contains no evidence regarding the petitioner's financial goals. There is also no evidence of the size of the United States investment, nor evidence that the company's shareholders had actually transferred any monies to the petitioner as of the date of filing. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2). Again, the director is instructed to request additional evidence to provide the petitioner with an opportunity to address these deficiencies.

Another issue to be addressed is whether the petitioner has acquired sufficient physical premises to house the proposed new office. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). The record contains a twenty-seven page master lease agreement between [REDACTED] and two versions of a one-page

sub-lease agreement between [REDACTED] and the petitioning company. The sub-lease agreement submitted with the initial petition is dated August 1, 2004 and indicates at clause three: "The period of this sublease will be a period of one (1) year unless the lease period is extended." The sub-lease agreement submitted in response to the director's request for evidence is nearly identical, but indicates at clause three: "The period of this sublease will be a period of one (1) year commencing from August 1, 2004 to July 3, 2005 unless the lease period is extended." Both documents refer to the petitioner's premises as "a space of approximately 300 sq ft for commercial use only."

The director noted that the petitioner submitted two different versions of the sub-lease agreement, and further found that the petitioner had failed to submit evidence that the sub-lessor had permission from the landlord to sublet space to the petitioner as required under the master lease agreement. The director concluded that the petitioner did not have a valid lease.

On appeal, counsel for the petitioner asserts that only one lease agreement was submitted by the petitioner. Counsel states that the lease between the sublessor and the petitioner remains in effect, explaining as follows:

While it is true that the sublessor is forbidden from subletting any of its premises without the Landlord's permission, there is nothing in the lease which renders the sublease *void* from its inception. Rather the sublease is *voidable* if the Landlord chooses to exercise any of its remedies described in Article 20. Unless and until one or more of those remedies is used against the sublessor, the lease between [REDACTED] and the petitioner remains a valid lease.

(Emphasis in original.)

Counsel resubmits the master lease agreement and sub-lease agreement that were submitted in response to the request for evidence.

The record as presently constituted does not demonstrate that the petitioner has acquired sufficient physical premises to house its new office. The petitioner has not described the type of business it intends to operate, or its anticipated space requirements for its business, therefore, even if the AAO accepted that the petitioner has a valid sub-lease agreement, it is not possible to conclude that 300 square feet of "commercial space" is sufficient for the petitioner to operate its business during the first year of operations. Although the sub-lease agreement was to be valid for a one-year period, it appears based on counsel's representations that the master lessor could take action to terminate the agreement at any time. In addition, the petitioner has not provided an explanation regarding the existence of two versions of the same sub-lease agreement.

To correct the deficiencies in the record, the petitioner should describe its anticipated space requirements and submit secondary evidence to establish that it was leasing the claimed office space at the time of filing, such as evidence of payments to the sublessor, photographs, and statements from the sublessor and its landlord confirming the petitioner's use of the office space. If the petitioner is not able to provide additional evidence that it had secured sufficient office space as of the date of filing the petition, the petition cannot be approved.

The director also addressed the issue of whether the petitioner and the foreign entity have a qualifying relationship as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner claims that it is an affiliate of the foreign entity, Lahor Limited, based on common majority ownership by the beneficiary, who is stated to own approximately 84 percent of each company.

As evidence of the U.S. company's ownership, the record includes the petitioner's Georgia articles of incorporation dated February 25, 1998, authorizing the issuance of 500,000 shares of stock; a May 25, 2004 certificate of authority to conduct transaction in Texas; copies of the petitioner's stock certificates numbers one through five, all of which are dated June 23, 2004; and the petitioner's stock transfer ledger. The stock certificates and transfer ledger indicate that 420,000 of the company's 500,000 shares have been issued to the beneficiary.

As evidence of the foreign company's ownership, the petitioner submitted the company's certificate of incorporation and its memorandum and articles of association. The memorandum of association indicates that the share capital of the company is divided into 50,000,000 shares, and includes a list of shareholders. The shareholder list shows that [REDACTED] owns 30,000,000 shares, the beneficiary is the second largest shareholder with 5,000,000 shares, and the remainder of the shares is divided between fifteen individuals. The petitioner also submitted what appears to be a statement of accounts for the year ended December 31, 2003. This document includes a list of the company directors and their interests in the company. The list indicates that the beneficiary owns a direct interest of 37,073 and an "indirect" interest of 17,607; [REDACTED] owns 7.50 shares, [REDACTED] owns 7.50 shares, [REDACTED] owns 22,222 shares, and [REDACTED] owns 17,037 shares. The statement contains the following note: "The indirect Shares of 23 million ordinary shares of one [REDACTED] each are held by [REDACTED] in which [REDACTED] [the beneficiary] is the majority shareholder." The petitioner submitted copies of its stock certificates numbers [REDACTED] and [REDACTED]. Stock certificate number [REDACTED] for 28,04,277 shares was issued to the beneficiary on March 23, 2000. The other four stock certificates were issued to the four "directors" identified above and totaled 5,302,000 shares.

Although the petitioner initially submitted its stock ledger and copies of five stock certificates in support of the petition, the director requested copies of these documents in his September 14, 2004 request for evidence, noting that it appeared that the company had recently authorized a "new issuance of stock." In an October 26, 2004 response, counsel asserted that the petitioner had only one issuance of stock and resubmitted copies of the five stock certificates issued on June 23, 2004.

Upon review of the petitioner's response to the request for evidence, the director concluded:

[I]t appears you have failed to fully document the ownership of the U.S. company. In the request for evidence you were asked to submit a copy of the original stock certificates and the ledger. In return you have stated that the certificates issued in 2004 are the original and only certificates issued by the corporation. It is not clear that no stock was issued in 1998 and the copies of the 2004 stock certificates, as submitted with the original petition, were unsigned and invalid at the time of filing this petition. This failure to document the complete history of

shares issued makes it impossible to determine the true relationship between the U.S. and foreign company.

On appeal, counsel asserts that the director erred by continuing to question whether the petitioner issued stock in 1998 when the petitioner's evidence shows that the only stock issuance occurred in 2004. Counsel asserts that the petitioner submitted sufficient evidence to establish the existence of a qualifying affiliate relationship between the U.S. and foreign entities.

Upon review, the AAO concurs with counsel that the director's analysis of this issue was flawed and based on speculation. However, the evidence of record is insufficient to establish the claimed affiliate relationship between the U.S. and foreign entities. The petitioner has not sufficiently documented the ownership and control of the foreign entity.

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.

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*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner has submitted a complete list of the foreign entity's owners as of September 1997, a partial list of owners as of 2003, and copies of five stock certificates issued in 2000. Based on this limited evidence, it is impossible to determine the foreign entity's actual ownership as of the date the petition was filed. The director should instruct the petitioner to submit copies of all stock certificates issued by the foreign entity, including voided certificates, as well as its the company's stock ledger or stock transfer register. The petitioner should also submit any other relevant corporate documents from the foreign entity referencing changes in ownership, issuance of stock, and transfer of stock from one shareholder to another. In addition, the petitioner should provide evidence of the ownership of [REDACTED] if it is claiming that the beneficiary owns a portion of the foreign entity's shares indirectly through this company.

It is emphasized that 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). Evidence and explanation that the petitioner submits must show eligibility as of the filing date, August 31, 2004.

In this matter, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for this nonimmigrant visa classification as of the date of filing the petition. The director's decision will be withdrawn and the matter remanded for further consideration and a new decision. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence she deems necessary.

**ORDER:** The decision of the director dated November 8, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.