

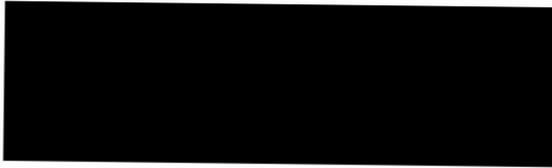
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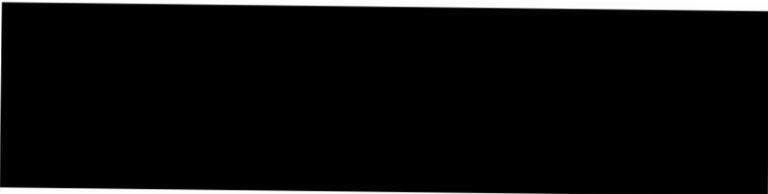


File: SRC 04 016 52095 Office: TEXAS SERVICE CENTER Date: **MAR 28 2006**

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

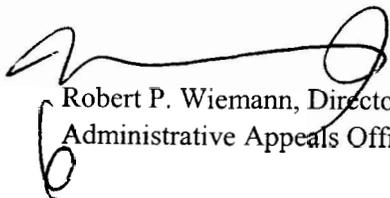
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

  
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 appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its manager 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 Georgia corporation and claims to be engaged in the recycling and export of automobile tires. The petitioner claims that it is the subsidiary of [REDACTED] located in Mumbai, India. The beneficiary has been employed by the petitioner in L-1A status since November 2000 and the petitioner now seeks to extend his stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish a qualifying relationship between the United States entity and the foreign entity. Specifically, the director noted that the petitioner had submitted inconsistent evidence regarding the ownership of the United States company.

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 asserts that the petitioner's response to the director's request for evidence was sufficient to establish the existence of an affiliate relationship between the United States and foreign entities. 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 issue in the present proceeding is whether the beneficiary's foreign employer and the U.S. entity are qualifying organizations as required by 8 C.F.R. § 214.2(l)(3)(i).

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;

\* \* \*

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

\* \* \*

(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 nonimmigrant petition was filed on October 20, 2003. On the L classification supplement to Form I-129, the petitioner indicated that the U.S. company is a subsidiary of the foreign entity and described each company's ownership as follows:

██████████ – Parent company with five partners, each has 20% share. 20% of ██████████ is owned by [the beneficiary]. [The petitioning company] is 100% owned by [the beneficiary].

In a letter dated July 25, 2003, the petitioner referred to the U.S. company as a subsidiary of the foreign entity, but did not discuss the ownership of either company. The petitioner provided a deed of partnership for the foreign entity, dated June 29, 1994, naming five individuals, including the beneficiary, as partners in the company. The petitioner submitted its articles of incorporation, which indicate that the company is authorized to issue “1,000,00 shares of \$1.00 par common stock.”

The petitioner also provided a copy of its 2002 IRS Form 1120, U.S. Corporation Income Tax Return. The Form 1120 indicates at Schedule E, Line 1 and at Schedule K, Line 5 that the beneficiary owns 100 percent of the petitioner’s common stock. The Form 1120 indicates at Schedule L, Line 22b that the petitioner’s common stock is valued at \$1,000.

The director issued a request for evidence on November 20, 2003, instructing the petitioner, in part, to submit evidence to show a qualifying relationship between the foreign and United States companies as defined in the regulations.

In a response dated December 22, 2003, counsel for the petitioner stated the following:

Enclosed for your review is a copy of the amended federal tax return, Form 1120, for the year 2002. The U.S. company shares the same stock structure as the foreign company. Each shareholder holds 20% of the stock in the foreign company ██████████ [The petitioner] is 100% owned by the five shareholders of ██████████ with [the beneficiary], Manager of the U.S. company . . . holding 20% of [the petitioner] and 20% of ██████████

The petitioner submitted a December 19, 2003 letter addressed to the Internal Revenue Service, in which it stated: “The percentage of ownership on the 2002 Form 1120 needs to be revised. The compensation of officers did not change; only the percentage of stock owned has changed. Attached is a copy of page two of Form 1120 the way it should have been filed.” The petitioner’s letter was accompanied by an amended 2002 Form 1120, Page 2, which indicates at Schedule E, Line 1 that five individuals own the company’s stock in equal proportions. The same five individuals are identified as the partners of the foreign entity in the previously submitted deed of partnership.

The director denied the petition on January 20, 2004, concluding that the petitioner did not establish that the foreign and U.S. entities had a qualifying relationship at the time the petition was filed. Specifically, the director determined:

This office requested additional information to show a qualifying relationship exists between the foreign and United States companies. The response states a different ownership for the United States company that was originally submitted with the petition. The new information is that the percentage of stock owned has changed. The information submitted at the time the

petition was filed shows different ownership of the foreign and United States companies. The foreign company is owned by 5 partners, each with 20% [of] the company. The United States company at the time the petition was filed had only one owner, the beneficiary.

On appeal, counsel for the petitioner asserts that the petitioner's response to the director's request for evidence, namely the amended IRS Form 1120, showed the correct ownership of the petitioning entity. Counsel submits the petitioner's stock transfer ledger and copies of the petitioner's stock certificates numbers one through five, each for 100 shares, issued to the five partners of the foreign entity. All of the stock certificates are dated April 20, 2000. The stock transfer ledger does not indicate the amount paid by each claimed shareholder for his or her shares in the petitioning company.

Upon review of the petition and evidence, the petitioner has not established that the foreign and United States entities enjoy a 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 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* 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 shareholders, 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.* at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(1)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. In this case, the petitioner's statements on the Form I-129 and in its 2002 Form 1120 indicated that the petitioner and the foreign entity shared only 20 percent common ownership and control. The petitioner claimed to be a subsidiary of the foreign entity, while simultaneously asserting that the beneficiary was its sole owner. Given this conflicting information and apparent lack of a qualifying relationship, the director reasonably requested additional documentation to establish that a qualifying relationship exists.

The petitioner chose to submit one amendment to its 2002 Form 1120, U.S. Corporation Income Tax Return, in response to the director's request. There is no evidence that the petitioner completed a Form 1120X,

Amended U.S. Corporation Income Tax Return, or actually submitted the amended form to the IRS, nor did the petitioner amend Schedule K of its 2002 Form 1120, which also identified the beneficiary as the sole owner of the company. The petitioner did not submit an amended I-129 Petition or otherwise indicate that its Form I-129 had been completed inaccurately, in spite of its initial indication that the beneficiary owns 100 percent of the petitioning company. The Form I-129 and Form 1120 were both signed by the beneficiary in his capacity as “manager” of the U.S. company, and it is reasonable to assume that he had an opportunity to review both documents for accuracy. Most importantly, the petitioner chose not to submit the documents generally accepted to establish ownership and control in the context of the visa classification, namely, the petitioner’s stock certificates, stock transfer ledger, corporate bylaws, the meetings of relevant shareholder meetings, and documentation to establish that the claimed shareholders actually paid for their interest in the company.

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). The petitioner’s self-prepared partially amended tax return, which may or may not have been submitted to the Internal Revenue Service, is not independent objective evidence and could not aid the director in determining the actual ownership and control of the United States company. 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 reason, the director properly denied the petition.

The petitioner now submits the petitioner’s stock certificates and stock transfer ledger for consideration on appeal. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

Nevertheless, in light of the unresolved inconsistencies catalogued above, the petitioner’s stock certificates and stock transfer ledger are insufficient to establish the actual ownership and control of the U.S. company. Based on the stock certificates submitted, it appears that the U.S. company has issued a total of 500 shares with a par value of \$1.00 per share. The petitioner’s stock transfer ledger does not identify how much money was paid by each shareholder in exchange for his or her shares, but it is reasonable to assume that they each paid the par value of \$1.00 per share, or \$100 each. However, the petitioner’s IRS Form 1120 indicates at Schedule L that the petitioner’s common stock is valued at \$1,000, which suggests that additional shares were issued subsequent to the incorporation of the company in April 2000. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho* at 591-2.

Collectively, the discrepancies and omissions in the petitioner’s evidence undermine the probative value of the evidence submitted on appeal and counsel’s claim that the petitioner and foreign entity enjoy an affiliate relationship based on common ownership by the same group of individuals. The petitioner has not submitted

probative evidence to overcome the deficiencies noted in the director's decision with respect to its qualifying relationship with the foreign entity. The evidence of record, considered in the aggregate, does not meet the petitioner's burden of showing that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). For this reason, the petition may not be approved.

Beyond the decision of the director, the record is not persuasive in demonstrating that the petitioner would employ the beneficiary in a managerial or executive capacity as defined in section 101(a)(44) of the Act. Based on the brief job description provided by the petitioner, it appears that the beneficiary is primarily engaged in non-qualifying operational duties associated with purchasing and exporting used tires, rather than performing the high-level responsibilities contemplated by the statutory definitions of managerial and executive capacity. The petitioner indicated that the beneficiary will manage and direct day-to-day operations relating to reviewing contracts, purchasing of used tires, researching quality of tires and prices of tires, authorizing purchases of tires, and shipping tires to India, as well as personally signing distribution contracts with suppliers, tracking inventory and providing customer service. The majority of these duties appear to be operational or first-line supervisory in nature. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

In addition, all of the supporting evidence submitted with the petition, particularly the petitioner's tax documents, indicates that the petitioner operates a gas station and convenience store, rather than an export business as claimed by the petitioner. While it is possible that the company operates two separate lines of business, the petitioner's failure to mention its retail operations raises questions regarding the credibility of the stated job duties for the beneficiary. 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. at 591.

Finally, the AAO notes that, although requested by the director, the petitioner has not submitted sufficient evidence to substantiate its claim that it employed five workers at the time the petition was filed. The petitioner has submitted Forms W-2, Wage and Tax Statement, issued to five workers in 2002, but there is no evidence that these employees remained on the petitioner's payroll as of October 2003 when the petition was filed. 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)).

Upon review of the totality of the record, there is insufficient evidence to establish that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. The record is ambiguous regarding the nature of the beneficiary's duties, the nature of the petitioner's business, and the actual number of subordinate employees who would relieve the beneficiary from performing the operational and administrative functions of the business. For this additional reason, the petition cannot be approved.

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).

Finally, the AAO acknowledges that CIS previously approved two L-1A nonimmigrant petitions filed on the beneficiary's behalf. However, each nonimmigrant petition has a separate record of proceeding with a separate burden of proof; each individual petition must stand on its own merits. *See* 8 C.F.R. § 103.8(d). The prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's and beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Moreover, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the prior approval would constitute material and gross error on the part of the director. Due to the lack of required evidence of eligibility in the present record, the AAO finds that the director was justified in departing from the previous approvals by denying the present extension petition.

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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