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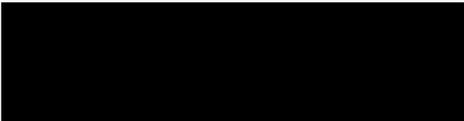


File: SRC 03 010 51965 Office: TEXAS SERVICE CENTER Date: DEC 04 2007

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 BENEFICIARY:



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 dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of president to open a new office 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, a corporation organized under the laws of the State of Texas, claims to operate retail stores and asserts that it has a qualifying relationship as an affiliate with two sole proprietorships located in India.

The director denied the petition concluding that the petitioner failed to establish that it and the foreign business organization(s) are qualifying organizations. Specifically, the director determined that the petitioner did not establish (1) that the beneficiary owns and controls the petitioner or the foreign business organizations; or (2) that the foreign business organization(s) are doing business as defined by the regulations.

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 to the petitioner asserts (1) that the beneficiary owns and controls both the foreign sole proprietorships and the petitioner and (2) that the foreign sole proprietorships are currently doing business.

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.

In addition, the regulation at 8 C.F.R. § 214.2(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, 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 the present matter is whether the petitioner has established that it and the foreign business organization(s) are qualifying organizations.

Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business." "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H). An "affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(1).

In this matter, the petitioner claims that the beneficiary owns and controls both it and the two foreign sole proprietorships with which the petitioner claims affiliation. In support, the petitioner submitted its articles of incorporation, bylaws, and a stock certificate purporting to issue all of the petitioner's stock to the beneficiary. The petitioner also submitted a variety of Indian tax documents, business registration certificates, and income statements indicating that the beneficiary operates a theater refreshment stand, and keeps a herd of approximately 120 buffalo, as "sole proprietorships." Finally, while the petitioner submitted a variety of

business documents related to the operation of the foreign sole proprietorships, these documents were either outdated, untranslated, or were not probative of current business activity.

On October 30, 2003, the director requested additional evidence. The director requested, *inter alia*, evidence establishing the beneficiary's ownership and control of both the foreign employer(s) and the petitioner and evidence that the foreign employer(s) are currently "doing business." The director specifically requested evidence establishing the amount paid by the beneficiary in exchange for the issuance of stock.

In response, the petitioner submitted evidence that \$15,500.00 was deposited into the petitioner's bank account in October 2002. However, the record does not reveal the source of these deposits nor does it connect these deposits with the issuance of stock to the beneficiary. The petitioner also submitted additional, mostly untranslated, invoices and documentation concerning the foreign sole proprietorships.

On March 31, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that it and the foreign business organization(s) are qualifying organizations. Specifically, the director determined that the petitioner did not establish (1) that the beneficiary owns and controls the petitioner or the foreign business organizations; or (2) that the foreign business organization(s) are "doing business" as defined by the regulations.

On appeal, counsel to the petitioner asserts that the beneficiary owns and controls both the foreign sole proprietorships and the petitioner and that the foreign sole proprietorships are currently doing business.

Upon review, counsel's assertions are not persuasive.

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 (Comm. 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. 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. See 8 C.F.R. § 214.2(l)(3)(viii). As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In this matter, the record is devoid of any evidence that the beneficiary actually paid for the stock supposedly issued to him by the petitioner. While the petitioner submitted evidence that \$15,500.00 was deposited into its bank account in October 2002, the source of these funds was not revealed. Furthermore, the petitioner offered no evidence connecting these deposits with the capitalization of the United States operation or the issuance of stock. As the source of these funds is fundamental to establishing that the beneficiary truly owns

and controls the petitioner, the petitioner has failed to establish that the petitioner is a qualifying organization as an affiliate of the foreign proprietorships.

Furthermore, the petitioner has failed to establish that the beneficiary owns and controls the foreign sole proprietorships. In support of the petition, the petitioner submitted Indian licensing and tax documents which explain that the beneficiary has conducted business as the provider of concessions at a theater and as the keeper of a dairy herd. However, the significance of these documents under Indian law as they relate to the establishment of the existence of bona fide business enterprises was not explained by the petitioner. In immigration proceedings, the law of a foreign country is a question of fact which must be proven if the petitioner relies on it to establish eligibility for an immigration benefit. *Matter of Annang*, 14 I&N Dec. 502 (BIA 1973). 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)).

Also, the facts of the instant case are not persuasive in establishing that the beneficiary continues to own and control the foreign sole proprietorships. As indicated above, the beneficiary traveled to the United States as a B-2 visitor for pleasure on April 15, 2002. Approximately six months later, the petitioner filed the instant petition. It is not credible that the theater concession stand and the management of the animal herd, to the extent these can be considered businesses in the beneficiary's absence, are still controlled by the beneficiary. To the contrary, it is more likely than not that the beneficiary no longer controls these assets. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm. 1984). A sole proprietorship is a business in which one person owns all of the assets and operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Edition).

Finally, the record is not persuasive in establishing that the foreign sole proprietorships were "doing business" at the time the petition was filed. While the petitioner submitted documentation, such as invoices, related to activities abroad, this documentation either predates the beneficiary's arrival in the United States as a visitor for pleasure, postdates the filing of the petition, is untranslated, or is not probative of the regular, systematic, and continuous provision of goods and/or services. Untranslated evidence is not probative and will not be accorded any weight in this proceeding. See 8 C.F.R. § 103.2(b)(3). 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). As a whole, the record is not persuasive in establishing that the beneficiary's claimed provision of concessions at a theater and the keeping of an animal herd can be considered "doing business." To the contrary, this type of activity appears to be more akin to the management and use of assets rather than the conduct of business as defined by the regulations. The "Statement of Assets/Valuation" is consistent with this observation in that the accountant failed to value the "businesses." Rather, the accountant valued livestock, land, and vehicles. The businesses appear to have no value apart from the beneficiary's use of his assets, e.g., animals, as a means of supporting himself. In the beneficiary's absence, this does not constitute the provision of services or goods in a regular, systematic, and continuous manner as foreseen by the regulations.

Accordingly, the petitioner has failed to establish that it and the foreign sole proprietorship(s) are qualifying organizations, and the petition may not be approved for this reason.

Beyond the decision of the director, the petitioner has failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner has not described with any specificity the proposed nature of the office, the scope of the entity, its financial goals, the investment in the United States operation, or the organizational structure of the foreign entity. The petitioner has only vaguely described its goals as follows: "to engage in the retail business by operating retail stores." While the petitioner implies in the letter dated January 14, 2004 that it intends to operate a gasoline station, the record is devoid of any information regarding location, products, projected revenue or expenses, or competition. Moreover, the only evidence regarding an investment in the United States operation is a bank statement showing three deposits totaling \$15,500.00. However, the source of these deposits was never revealed, and the petitioner has failed to establish that this investment would be sufficient to establish a "retail store." Once again, 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).

Accordingly, the petitioner has failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner did not establish that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In the initial petition, the petitioner provided a copy of a "Commercial Lease Agreement" for 200 square feet of "office space." However, the record does not establish that this relatively small office will be sufficient to house the petitioner's "retail store." The securing of leased space alone is not sufficient to establish eligibility under the regulations. The petitioner must also establish that these physical premises will be "sufficient." In this matter, the record is devoid of any such evidence, and the petitioner's vague description of its proposed business operation, i.e., a retail store, is clearly inconsistent with the premises secured.

Accordingly, the petitioner did not establish that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A), and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary was employed abroad in a primarily managerial or executive capacity for one year within the preceding three years. 8 C.F.R. § 214.2(l)(3)(v)(B).

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 petitioner described the beneficiary's claimed duties abroad in a letter dated January 14, 2004. As this letter is in the record, this job description will not be repeated here. Generally, the beneficiary is described as managing all aspects of his sole proprietorships, i.e., the dairy herd and the concession stand. The petitioner also indicated that the beneficiary supervised five managers who, in turn, supervised subordinate workers.

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv). The petitioner's description of the job duties must clearly describe the duties performed by the beneficiary and indicate whether such duties were either in an executive or managerial capacity. *Id.*

As a threshold issue, it does not appear that the beneficiary was truly "employed" abroad by his sole proprietorships. As indicated above, unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *Matter of United Investment Group*, 19 I&N Dec. 248. As one cannot employ himself, the beneficiary cannot be considered an "employee" of the foreign sole proprietorships. It

cannot be said that the beneficiary was being "controlled" as an employee in the context of a master-servant relationship. *See generally Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003).

Furthermore, the petitioner's description of the beneficiary's job duties has failed to establish that the beneficiary acted in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary did on a day-to-day basis. The fact that the petitioner has given the beneficiary a managerial title and has prepared a vague job description which includes inflated, broad duties does not establish that the beneficiary was actually performing managerial duties. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190.

The petitioner has also failed to establish that the beneficiary supervised and controlled the work of other supervisory, managerial, or professional employees, or managed an essential function of the organization. While the petitioner asserts that the beneficiary supervised five managers who, in turn, supervised subordinate workers, the record is not persuasive in establishing that the "managers" were truly primarily supervisory workers. To the contrary, it is not credible that a theater concession stand and the care of 120 animals would require a tier of subordinate supervisors and managers. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. The petitioner has not established that the reasonable needs of the foreign sole proprietorships compelled the employment of a managerial or executive employee to oversee one or more subordinate supervisors. To the contrary, it is more likely than not that the beneficiary and his workers were primarily performing non-qualifying tasks. *See Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006).

In view of the above, the beneficiary would appear to have been primarily a first-line supervisor of non-professional employees, the provider of actual services, or a combination of both. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial 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. Section 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. As the petitioner did not reveal the skill level or educational background of the subordinate employees, the petitioner has not established that the beneficiary managed professional employees. Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.

Similarly, the petitioner has failed to establish that the beneficiary acted in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex

organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary acted primarily in an executive capacity. The job description provided for the beneficiary is so vague that the AAO cannot deduce what the beneficiary did on a day-to-day basis. Moreover, as explained above, the beneficiary appears to have been primarily employed as a first-line supervisor and/or was performing tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary was employed primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and the petition may not be approved for this additional reason.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.