U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship
and Immigration
Services

[redacted]

D7

File: EAC 07 159 51670 Office: VERMONT SERVICE CENTER Date: NOV 04 2008

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Vermont 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 extend the employment of its vice president 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 that is engaged in the retail business. The petitioner claims that it is the subsidiary of M/S Sony Enterprises located in Hyderabad, India. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay.

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

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 beneficiary will be engaged in primarily managerial duties. In support of this assertion, counsel submits additional evidence.

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.
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> (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

At issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be

> acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter dated April 25, 2007 accompanying the Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's job duties as follows:

> Operations (Twenty Five Percent (25%)) Analyze operations to evaluate performance of a company and its staff in meeting objectives, and to determine areas of potential cost reduction, program improvement, or policy change. Direct, plan, and implement policies, objectives, and activities of the businesses in order to ensure continuing operations, to maximize returns on investments, and to increase productivity. Appoint department heads or managers, and assign or delegate responsibilities to them. Confer staff members to discuss issues, coordinate activities, and resolve problems.
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> Human Resources (Fifteen Percent (15%)) Direct Human resources activities, including the approval of human resource plans and activities, the selection of other high-level staff, and establishment and organization of major departments. Establish departmental responsibilities, and coordinate functions among departments and sites. Implement corrective action plans to solve business problems.
>
> Finance and Accounting (Twenty Percent (25%)) [sic] Coordinate the development and implementation of budgetary control systems, record-keeping systems, and other administrative control processes. Direct and coordinate an organization's financial and budget activities in order to fund operations maximize investments, and increase efficiency. Prepare and present reports concerning activities, expenses, budgets, government statutes and rulings, and other items affecting businesses or program services.
>
> Expansion (Thirty-Five Percent (35%)) Analyze potential new investments, zoning and legal issues, negotiate for acquisitions. Meet with potential partners, co-investors, franchisors,

> sellers, brokers, etc. and prepare due diligence, review contracts, and discuss contracts with attorneys.

In the same letter, the petitioner indicates that it employs a total of seven persons, although no information was provided relating to personnel other than the beneficiary.

On June 28, 2007, the director issued a request for further evidence (RFE). Among other things, the director requested a comprehensive description of the beneficiary's proposed duties, indicating how the beneficiary's duties will be managerial or executive in nature; a list of the company's employees in the United States, identifying each employee by name and position title; and a complete position description for each employee, including the beneficiary, with a breakdown of the number of hours devoted to each of the employee's job duties on a weekly basis

In a letter dated September 18, 2007 responding to the RFE, the petitioner restated the previous description of the beneficiary's duties. In addition, the petitioner sets forth the time spent by the beneficiary on his job duties is as follows:

> Business planning and expansion: The beneficiary negotiates to open new businesses (so far has opened one and is in negotiations to acquire another business named, Raceway [sic]); specifically, works with business brokers to look for investments; works with business brokers to perform due diligence; investigate new investment plans for the company; meets with business brokers and investigates prospective investment deals for the company; works with brokers to perform due diligence in order to properly investigate potential investments; liaises with prospective sellers; negotiate leases; meets with property owners and negotiate leases; review contracts and sale agreements; arrange for financing for business investments; negotiate on behalf of, and binds the company in securing loans, sale agreements, contracts, etc. <u>14 Hours per week.</u>
>
> Financial/Sales Management: Establishes budgetary plans for the company and ensures compliance therewith; review daily takings with management, together with review of banking, budgeting, accounting issues. Review monthly financial statements to determine business expansion possibilities and ensure efficient and cost effective management of company. Liaises with Accountant to discuss financial issues. <u>10 Hours per week.</u>
>
> Recruiting and hiring: Installs management and staff teams into businesses; recruits and hires staff; ensures that management trains staff appropriately. <u>4 Hours per week.</u>
>
> Operations and administrative management: Ensures smooth operation of company by implementing administrative operating systems through Manager and, including inventory control. Directs purchasing of inventory, sourcing of vendors, and negotiating with vendors. <u>8 Hours per week.</u>
>
> Sets and implements corporate policy through Management (Manager) <u>4 Hours per week.</u>

The petitioner also submitted an organizational chart for the U.S. company, which shows that the staff consists of the president, the beneficiary as vice president, and under the beneficiary, a manager of retail operations, an assistant manager, and three cashiers.

The petitioner describes the president's job duties as follows:

- Short and long-term running of the business and the setting and implementation of corporate policy, over which he exercises complete discretionary authority. 10 Hours per week.
- All finance, sales, and marketing. 20 Hours per week
- He has full and absolute authority to bind the company in financial and other agreements, and all employees directly or indirectly report to him. 10 Hours per week.

The store manager's duties are described as follows:

- Managing staff, preparing work schedules and assigning specific duties. 10 Hours per week.
- Directing and coordinating activities of business concerned with production, pricing, and sales. 20 Hours per week.
- Inventory management. 5 Hours per week.
- Handling customer service issues. 2 Hours per week.
- Store Manager is responsible for notifying [the beneficiary] of any inventory needs, suggestions, and improvements. 3 Hours per week.

The assistant store manager's duties appear to be identical to those of the managers, with the same weekly time allocation, except that he reports inventory needs, suggestions, and improvements to the manager rather than the beneficiary. The cashiers' weekly duties, according to the petitioner, include checkout and other cash register-related tasks, maintenance of the checkout area, and answering customers' questions.

On November 1, 2007, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director noted that, based on the information provided, it appears that there are four tiers of management to manage three employees. The director found that given the size and nature of the company, the beneficiary would be engaged primarily in non-managerial, operational tasks and will act more or less as a first line supervisor. The director further expressed concern that a photograph of the exterior of the foreign company appears to have been altered. The director found that the apparent alteration raises serious questions about the rest of the documents submitted by the petitioner as well as the legitimacy of the petitioner's business.

On appeal, counsel contends that the evidence shows that the beneficiary's position meets the criteria for executive and managerial under Section 214.2(1)(1). Counsel states that the beneficiary is responsible for the overall operations of the business including finance, sales, marketing, inventory, purchasing, hiring and firing. Counsel sets forth yet another description of the beneficiary's duties:

> As Vice President of the [U.S. entity, the beneficiary] is responsible for the overall operations of the retail business including finance, sales, marketing, inventory, and purchasing, hiring and firing all of which are essential functions within the organization. Specifically, [the beneficiary] is responsible for the following:
>
> - Review the financial statements and reports to determine profitability and efficiency. Prepare budgets, record keeping system, review tax related documents and liaise with the Accountant for the retail business. (30-40% of the time)
> - Oversee the retail operations and staff (30-40% of the time),
> - Establish business contracts to ensure inventory build-up and maintenance i.e. [sic] negotiate pricing with distributors, vendors for inventory items (20-30% of the time),
> - Oversee customer service recommendations, suggestions, and complaints to ensure customer satisfaction and growth (10-20% of the time),
> - Responsible for the advertising and marketing of company products and services i.e. negotiate promotions with vendors (5% of the time),
> - Manage the hiring and training of personnel of U.S. personnel, who will in turn be responsible for the operations, sales and development of the company's products,
> - Manage the training of U.S. personnel (Manage, Retail Operations) in the correct proprietary methodology needed for operations or merchandise to sell under the company's name.

Elaborating on the above job description, counsel asserts that the beneficiary's duties meet the requirements for both managerial and executive capacity. Regarding the foreign entity, counsel states that because its business premises in Hyderabad has been undergoing construction, the company's permanent sign was replaced with a temporary sign, which was presumably the one in the photograph submitted into evidence. Counsel provides copies of the construction contract and several affidavits from customers and neighboring business owners attesting to the ongoing construction. Counsel also states that since the petition was filed, the U.S. entity has established another U.S. corporation of which it owns 52%. Counsel claims that the beneficiary's role will be expanded to include management of a new retail store to be established under the new corporation.

Upon review, the record is not persuasive in demonstrating that the beneficiary would be employed 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

In the instant matter, the petitioner and counsel have submitted three sets of descriptions of the beneficiary's job duties and time allocated to each duty, each different from the next. For example, the job description submitted with the initial application states that the beneficiary spends 25% of his time on "operations," 15% on "human resources," 25% on "finance and accounting", and 35% on "expansion." In response to the RFE, the petitioner submits a document which indicates that the beneficiary spends 14 hours per week (or 35% of a 40-hour work week) on "business and expansion," 10 hours (25%) on "financial/sales management," 4 hours (10%) on "recruiting and hiring," 8 hours (20%) on operations and administrative management, and 4 hours (10%) on "set[ting] and implement[ing] corporate policy." In contrast, on appeal, counsel states that the beneficiary spends 30-40% of his time on financial matters, 30-40% on overseeing the retail operations and staff, 20-30% on inventory-related tasks, 10-20% overseeing customer service matters, 5% on marketing and advertising, and an unstated amount of time on hiring and training personnel. Neither the petitioner nor counsel accounts for the variances in these job descriptions. 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).

In addition to the discrepancies in time allocation, the job descriptions provided are inconsistent with one another in terms of the duties described, and in some instances also inconsistent with the nature of the business as described by the petitioner. For example, both of the job descriptions provided by the petitioner assign as much as 35% of the beneficiary's time to tasks relating to the "expansion" of the company, whereas counsel's recounting of the beneficiary's job on appeal makes no mention of such tasks. In addition, the evidence indicates that the U.S. business consists of a single gas station convenience store with three cashiers and four other employees including the president of the company, the beneficiary, and a store manager and assistant manager. However, the beneficiary's job description that was submitted with the initial petition appears to reference a different business entity altogether when it attributes to the beneficiary tasks such as "appoint department heads or managers," and "establish departmental responsibilities and coordinate functions among departments and sites." Such inconsistencies between the description of the beneficiary's job duties and the nature of the actual company causes the AAO to question the accuracy of the job descriptions provided. 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. 591.

Moreover, given the shifting descriptions of the beneficiary's job duties and allocation of his work hours, it is unclear what exactly the beneficiary's duties are and how much time the beneficiary actually spends on each duty. Consequently, the AAO is unable to determine based on the information provided whether the beneficiary's duties are *primarily* managerial or executive in nature, as the regulations require. Furthermore, both the petitioner and counsel indicate that the beneficiary's job include tasks such as "directs purchasing of inventory, sourcing of vendors, and negotiating with vendors;" "negotiate pricing with distributors, vendors for inventory items;" "[being] responsible for the advertising and marketing of company products and services;" and "prepare budgets, record keeping system, review tax related documents and liaise with the accountant for the retail business." Negotiating with vendors, sourcing inventory, marketing the company's products, and record keeping would be considered tasks necessary to produce the company's product or to provide the company's services. The job descriptions for the beneficiary's subordinates do not show that they perform any of these tasks; as such, it must be concluded that the beneficiary performs the described tasks himself rather than supervises other employees who perform them. Again, given the inconsistencies among the job description provided, the AAO cannot ascertain the true extent to which the beneficiary is involved in these non-qualifying tasks. 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 light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

With respect to counsel's assertion on appeal that the U.S. business has expanded since the petition was filed, thereby broadening the beneficiary's managerial role, it is noted 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). Thus, the beneficiary's eligibility for the benefit sought will be determined based upon his role within the company at the time the petition was filed, and new evidence relating to recent development within the company will not be considered.

The AAO also finds that counsel's assertions and further evidence submitted on appeal are insufficient to overcome the director's finding that the photographs of the foreign entity's exterior previously submitted are fraudulent. Counsel explains that the apparently altered sign bearing the foreign entity's name on the storefront in the photographs is actually a temporary sign placed there during construction. However, upon close inspection, the sign clearly appears to be a digital addition to the photographs rather than an actual sign. The photographs depict a storefront with a series of overhead lights and a glass window. Below the overhead lights, the photographs have a uniform blue sign, with the words "Sony Enterprises" inserted. The uniformly blue sign is in stark contrast to the noisy, pixilated image of the store, and the name "Sony Enterprises" is an electronic font with pixilated edges. Additionally, the AAO notes that the upper edge of the blue sign overlaps and erases the edge of the overhead lights, clearly indicating an electronic alteration of the photographs. Moreover, the AAO notes that the construction contract counsel submitted is not signed by any of the alleged parties to the contract, thus casting doubt upon its authenticity.

The AAO finds that the petitioner knowingly submitted documents containing false statements in an effort to mislead the Citizenship and Immigration Services (CIS) and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. *See* 18 U.S.C. §§ 1001, 1546. The AAO hereby enters a finding of fraud.

Additionally, the evidence discussed above is not credible and will not be given any weight in this proceeding. 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). Moreover, the petitioner's submission of fraudulent photographs and documentation brings into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 591.

Beyond the director's decision, the petitioner has not provided sufficient evidence to establish that a qualifying relationship continues to exist between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. at 597; *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 the initial petition, the petitioner indicated that the U.S. entity is wholly owned by the foreign entity. In support of this claim, the petitioner submits an undated copy of share certificate number 1 of the U.S. entity, which indicates that the foreign entity owns 1,000 shares of the U.S. entity. The petitioner submitted no other evidence of ownership interest in the U.S. entity. 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. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control and therefore cannot conclude that a qualifying relationship between the U.S. and foreign entities continues to exist as claimed. For this additional reason, the petition will be denied.

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 she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner knowingly submitted documents containing false statements in an effort to mislead CIS and the AAO on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States.