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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090

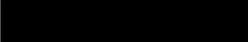


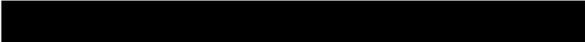
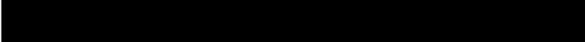
**U.S. Citizenship  
and Immigration  
Services**

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07

DATE: **MAY 31 2011** Office: CALIFORNIA SERVICE CENTER FILE: 

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:**  
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California limited liability company established in November 2008, intends to operate an oil trading and distribution company. It claims to be a subsidiary of Niles Oil Mill, located in India. The petitioner seeks to employ the beneficiary as the manager of its new office in the United States for a period of one year.

The director denied the petition concluding that the petitioner failed to establish: (1) that it had secured sufficient physical premises to house the new office as of the date of filing the petition; and (2) that the U.S. and foreign entities have a qualifying relationship.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petitioner did in fact sign a lease for commercial premises prior to filing the petition, and provided ample documentation to demonstrate that it is a wholly-owned subsidiary of the foreign entity. Counsel submits a brief and additional evidence in support of the appeal.

#### **I. The Law**

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.

## II. The Issues on Appeal

### A. *Sufficient Physical Premises to House the New Office*

The first issue addressed by the director is whether the petitioner established that it secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

Evidence of the physical premises secured for the new office is required initial evidence for a petition filed pursuant to 8 C.F.R. § 214.2(l)(3)(v). Therefore, the critical facts to be examined are those that were in existence at the time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts.

*See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 17, 2008. The petitioner stated on the Form I-129 that its mailing address is [REDACTED]. The petitioner listed this same location as the beneficiary's intended work site and current U.S. address. In a letter dated September 12, 2008, counsel indicated that the petitioner was submitting a copy of its lease agreement and photographs of the U.S. organization in support of the petition.

Upon review of the initial evidence, the petitioner did not include a copy of its lease agreement. The petitioner did submit three photographs. One photograph depicts two individuals in a large, mostly empty room or storage space, one depicts a computer workstation, and one depicts a storefront and a painter. The street number of the building storefront appears to be "56." There is a sign with the petitioner's company name on the photograph of the building exterior.

The petitioner stated in its business plan that it will be located in Buena Park, California, operating from facilities with 350 square feet of space which will be used to meet with potential clients, and as a "communications center." The business plan indicates that the company has "negotiated lease terms" for the property.

The director issued a request for additional evidence (RFE) on December 23, 2008, in which she instructed the petitioner to: (1) describe in detail the type of business the U.S. entity will operate; (2) define the type of worksite, such as a sales office, distributorship, etc.; (3) explain what type of building the U.S. entity is occupying; (4) provide a floor plan for all spaces including office, warehouse and production spaces; (5) submit color photographs of the U.S. business showing both the inside and outside of all workspaces; and (6) provide documentation related to the U.S. company's lease or sublease agreement.

In a response dated February 9, 2009, counsel indicated that the petitioner intends to operate as a distributor of natural edible oils, organic oils and oil-related supplies to retailers, whole food markets, individuals and other businesses. The petitioner indicated that its premises are located in a strip mall, and described the type of premises as "a distributorship with 350 square feet of office and warehouse space to meet with potential clients and be utilized as the communications center."

The petitioner stated that its office is leased from [REDACTED] the owner of the premises located at [REDACTED]. The petitioner submitted a copy of a commercial lease agreement executed on January 28, 2009, for a portion of the building. The term of the lease is two years commencing on January 18, 2009. The landlord required a security deposit of \$2,000 and monthly rent of \$500.

The petitioner submitted a floor plan which depicts a 12 ft. by 14 ft. warehouse area, an 8 by 10 foot office, and a small waiting area. The petitioner also included color photographs which are larger versions of the black and white copies submitted with the initial petition. These photographs depict: (1) a small office with a

desk and computer workstation and fax machine; (2) a fairly large storage or warehouse space with two unidentified people pictured; and (3) an exterior photograph which shows a storefront with an awning, the street number "56", a painter at work, and a sign with the petitioner's company name. Finally, the petitioner submitted an Orange County, California property tax bill issued to Pramukha Patel, for the premises at [REDACTED] which, according to the tax bill, is the site of "Rome-In Liquor Store."

The director denied the petition on February 18, 2009, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director noted that the lease does not state the square footage of the premises and was not in effect at the time the petition was filed. The director observed that, as the petitioner did not establish that it had secured premises prior to filing the petition, it cannot establish eligibility at the time the petition was filed, as required by 8 C.F.R. § 103.2(b)(12).

On appeal, counsel asserts:

While it is true that the lease deed submitted in response to the request for evidence was erroneously dated January 28, 2009 to January 27, 2011, it is also true that the lease for the same premises was entered into on November 6, 2008 with an Addendum on November 10, 2008 to specify the square footage leased, between the same parties for the same premises for the same period of two years, and that the lease in question has been in effect since November 6, 2008, before the petition was filed. The reason they amended the lease on January 28, 2009 to January 27, 2011 was because Landlord and Tenant did not engage professional services for this lease transaction and being unsophisticated in executing such contracts, erroneously committed a mistake in omitting to mention the fact that although it was executed on January 28, 2009, it was to be in effect from November 6, 2008.

The fact of the matter is that the parties are not trying to avoid the contract. The parties are unsophisticated in the legal sense and they entered into this agreement without any professional legal help. Hence, the unintentional errors were committed. However, both the landlord and the tenant entered into a lease agreement first on November 6, 2008 terminating on November 5, 2010, added an addendum on November 10 specifying that the 'portion' leased was three hundred and fifty square feet, and further modified it on January 28, 2009 to change the terms from a sub-lease to a lease, fully intending it to be retroactive from the date they originally entered into a contract.

Counsel asserts that the petitioner submitted evidence that the landlord owns the property, and that, "but for the mistake in amending the lease, the premises were secured well before the petition was filed; it was not material evidence secured at a later date." Counsel contends that "an error was made by the landlord and the tenant as laypersons, without the assistance of professionals, in entering the date in the amendment to the lease."

In support of the appeal, the petitioner submits a letter dated March 12, 2009, signed by the beneficiary and the landlord, [REDACTED] indicating that they prepared their initial lease dated November 6, 2008 without the advice of an attorney. The parties indicate that they erroneously assumed that the agreement should be a sub-lease, and when trying to correct the lease in January 2009, made a mistake by not using the original lease dates.

The petitioner also submits an "Amendment to California Commercial Lease Agreement Executed on November 6, 2008 and Addendum Executed on November 10, 2008." The parties indicate that they have executed the March 12, 2009 amendment for the purpose of retracting the Commercial Lease Agreement executed on January 28, 2009, "due to error in its execution."

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted evidence that it had secured adequate physical premises to house the new office as of the date of filing. It is the petitioner's burden to 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'r. 1978). Furthermore, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(12). Evidence of physical premises to house the new United States company is required initial evidence pursuant to 8 C.F.R. § 214.2(l)(3)(v)(A).

As noted above, the record of proceeding does not contain a copy of the original lease executed in November 2008, and the lease executed in January 2009 makes no reference to a prior agreement between the parties. Further, the record contains no secondary contemporaneous evidence establishing that the parties had an agreement prior to January 2009, such as evidence that the petitioner paid the \$2,000 security deposit to the landlord, or evidence of rent payments for the months of November 2008 through January 2009. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

While both parties to the lease agreement executed on January 29, 2009 have now retracted that agreement, the AAO cannot find that the petitioner has established eligibility without a copy of the claimed original lease agreement and addendum.

Furthermore, even if the petitioner had established the lease agreement was in place as of November 2008, the photographs and floor plan raise questions as to whether the location is suitable for the petitioner's planned oil distribution business. The petitioner claims that its leased space is located at [REDACTED] and consists of a small office, a waiting area and a 12 by 14 foot warehouse space. The photographs submitted show the exterior of a building that has a street address of "56." The interior photographs show a storage or warehouse space that is clearly larger than 12 by 14 feet. There is a clear discrepancy between the petitioner's claims regarding its secured premises, the floor plan submitted, and the photographs. 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).

Further, a review of the property tax bill issued to the owner of the leased space indicates that the owner operates a liquor store known as "Rome-In Liquor" located at [REDACTED]. As the terms of the lease indicate that only a portion of the premises have been leased to the petitioner, the petitioner's evidence should include a complete floor plan for the premises that clearly identifies how the building is divided to accommodate a liquor store and an oil distribution office and warehouse.

Based on these deficiencies and discrepancies, the petitioner has not established that it had secured physical premises to house the new office as of the date of filing, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). Accordingly, the appeal will be dismissed.

**B. Qualifying relationship**

The remaining issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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;
  - (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

\* \* \*

- (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 petitioner stated on the Form I-129 that it is a subsidiary of [REDACTED] located in India. In support of the petition, the petitioner submitted its membership certificate number "0001" issued to [REDACTED] on November 10, 2008.

In its letter dated December 16, 2008, the petitioner stated that the petitioner "was incorporated on behalf of [REDACTED] as a wholly owned subsidiary." The petitioner further stated that "Lalita International is the primary partner and owns 51% of [the Petitioner], and hence, the Petitioner is a wholly owned subsidiary of [REDACTED]"

The petitioner also submitted a business plan at the time of filing. According to the plan's Executive Summary the principal owners of the company are [REDACTED] and [REDACTED]." At section 2.1 of the business plan, the petitioner states that it is a wholly-owned subsidiary of [REDACTED], but also states that [REDACTED] will be the sole owner, and that 51 percent of the share capital of the petitioner is owned by [REDACTED]. The evidence of record shows that the beneficiary is one of 14 partners of the foreign entity, with a 51 percent interest in the company.

In the request for evidence issued on December 23, 2008, the director instructed the petitioner to submit: (1) proof of stock purchase showing that the foreign entity has paid for its share of the U.S. entity, including original wire transfers, canceled checks and deposit receipts, with originator of the monies deposited or wire clearly shown and verifiable; (2) minutes of the meeting for the U.S. company that lists the stock shareholders and the number and percentage of shares owned; (3) articles of incorporation for the U.S. company; (4) copies of all stock certificates issued by the U.S. company; (5) a copy of the U.S. company's stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders and purchase price; and (6) a copy of the U.S. company's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts.

In response, counsel indicated that the petitioner inadvertently submitted a "rough draft" of its business plan in support of the petition. The petitioner submitted a slightly revised plan in response to the RFE in which it revised the amount of the initial investment into the U.S. company, and removed any reference to Nileshkumar Patel as the co-founder of the U.S. company.

In response to the director's specific inquiries, counsel explained that the foreign entity paid for the formation of the U.S. company. Counsel stated that she hired a company to incorporate the U.S. company, billed the petitioner for this and other services, and the foreign entity reimbursed the petitioner through a money order as payment for the stock purchase.

The petitioner submitted two Wells Fargo Bank Transaction Record receipts indicating that a deposit of \$500 cash was made in the petitioner's account and a deposit of \$100 was made into the petitioner's second Wells Fargo Bank account on January 22, 2009. These appear to have been the opening deposits.

The petitioner submitted a copy of counsel's invoice of expenses charged to account [REDACTED] which included a \$140.21 fee for filing documents with the California Secretary of State. The petitioner also provided copies of two Western Union money orders for \$500 each made payable to counsel's law firm. Both money orders are dated October 3, 2008.

In addition, the petitioner submitted a copy of a Notice of Transaction Pursuant to Corporations Code Section 25102(f) indicating that the petitioner issued common stock valued at \$500 on November 15, 2008. The notice was filed on February 5, 2009.

The petitioner provided a copy of a Promissory Note dated November 10, 2008, in which the foreign entity promised to pay the petitioner \$500 by January 31, 2009 in exchange for 100% of the U.S. company's stock. The petitioner submitted a Wells Fargo Bank deposit receipt dated January 30, 2009 indicating that the petitioner's account was credited with \$500 on that date.

The petitioner also submitted a "Manager Certificate of Company Resolution" dated November 15, 2008, in which it was resolved that [REDACTED] has sole ownership interest in [the petitioner]."

Finally, the petitioner resubmitted its membership certificate number "0001" and submitted a membership registry indicating that certificate number 0001 representing 100% of membership units was issued to the foreign entity on November 10, 2008 in exchange for \$500.

The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. In denying the petition, the director determined that the petitioner "has not submitted the stock certificate, corporate stock ledger, corporate bylaws, and the minutes of relevant annual shareholder meetings or other evidence formalizing the transfers." The director further found that the petitioner failed to provide evidence such as the original wire transfer from the parent company, or other evidence that the foreign entity paid for its ownership in the U.S. company.

On appeal, counsel asserts that the foreign entity is the sole owner of the U.S. company as demonstrated by its ownership of the only issued membership certificate. Counsel contends that the director erred by observing that only a membership certificate was submitted, as the petitioner submitted all evidence requested in the RFE with respect to the ownership of the U.S. company, including its membership certificate registry, evidence of payments from the foreign entity, and other documentation demonstrating the foreign entity's ownership.

With respect to the director's finding that the petitioner failed to submit the original wire transfer from the foreign entity, the petitioner noted that "the amount the parent company spent on purchasing the stocks of the subsidiary was \$500 as demonstrated by the Promissory Note executed by the Indian parent and the note amount paid off by [REDACTED] on behalf of the India parent by depositing \$500 into the business account of the U.S. entity." Counsel noted that the beneficiary had this "petty amount" of money, so he used

the funds to purchase the stocks, and the Indian parent intends to reimburse him by transferring the money to the U.S. account upon approval of the visa petition.

Upon review, the AAO will affirm the director's conclusion that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. While counsel correctly states that the petitioner did not submit merely a membership certificate, the director properly determined that the petitioner failed to provide evidence that the foreign entity actually paid for its ownership interest in the U.S. company.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock or membership certificates into the means by which ownership was acquired. 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 or membership unit ownership.

In this case, while the petitioner indicates that the foreign entity has paid \$500 for the purchase of its membership interest, none of the evidence identifies the foreign entity as the originator of any funds transferred or deposited into the petitioner's account. For example, the petitioner indicated that money orders in the amount of \$500 were intended to pay legal expenses associated with the formation of the U.S. company, but the invoice from counsel's firm was dated November 30, 2008, and the submitted money orders were dated October 3, 2008. Regardless, the petitioner did not submit evidence that the foreign entity actually purchased the money orders. While the promissory note indicates the foreign entity's promise to pay \$500 for "100% stock certificates" by January 31, 2009, and the petitioner submits evidence that a \$500 deposit was made to the petitioner's bank account on January 30, 2009, it concedes that the beneficiary and not the foreign entity, actually made this deposit from his own personal funds. Counsel describes the \$500 cost of sale as a "petty amount" which raises the question of why a promissory note was even executed or why the foreign entity did not pay the amount on the date the membership certificate was issued. The record is devoid of any direct evidence of payments from the foreign entity to the U.S. entity, and even indicates that the funds needed for start-up costs will come from the beneficiary himself and from personal loans that he obtains from his family and friends.

In addition, the AAO cannot overlook the fact that the petitioner initially referred to the beneficiary and [REDACTED] as co-founders of the company, and has at times in the record indicated that the foreign entity owns 51 percent, rather than 100 percent of the issued membership units. While the petitioner later stated that it inadvertently submitted a draft business plan as of the date of filing, the petitioner has not adequately explained why such statements would have been included in a draft plan if the foreign entity has always been the sole owner of the U.S. company, as claimed.

Due to the deficiencies and discrepancies in the record, the petitioner has failed to establish that the foreign entity has actually paid for its claimed ownership interest in the U.S. company, and therefore has not established that it has a qualifying relationship with the petitioner. For this additional reason, the appeal will be dismissed.

The petition will be denied and the appeal dismissed 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.