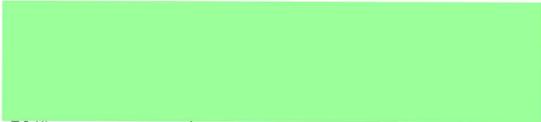


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **MAR 09 2013** OFFICE: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker under 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 classify the beneficiary as an L-1B 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 corporation established in 1998, is engaged in the restaurant business. The petitioner claims to be a wholly owned subsidiary of [REDACTED] located in India. The petitioner seeks to employ the beneficiary as a Southern Indian Vegetarian Specialty Cook for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish the beneficiary possesses specialized knowledge or that he will be employed in a position requiring specialized knowledge. Further, the director also found that the petitioner had not met the burden of demonstrating a qualifying relationship between the petitioner and the foreign employer as required by the Act.

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 submits additional evidence related to the ownership of the petitioner and contends this establishes the required qualifying relationship between the petitioner and the foreign employer. Additionally, counsel maintains that the beneficiary's knowledge is indeed specialized, contrary to the conclusion of the director.

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 the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate.

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.

I. The Issues on Appeal:

A. Qualifying Relationship

As noted, the director denied the petition finding that the petitioner had not established that a qualifying relationship existed between the petitioner and the foreign employer 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;
- (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.

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 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'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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 present matter, the petitioner states that all of the petitioner's 10,000 shares are owned by the foreign employer and submits a stock certificate to document this assertion, thereby re-submitting this document on appeal and offering this as new evidence to establish the foreign employer's ownership and control over the petitioner. However, the petitioner also offers on the record that the petitioner owns a limited liability company called [REDACTED] that operates a Southern Indian restaurant called [REDACTED] for which the beneficiary will work as a specialty cook; and discrepancies on the record call into question whether [REDACTED] is owned and controlled by the petitioner as asserted. In turn, doubt is cast on whether a qualifying relationship exists between the actual entity for which the beneficiary will be working, [REDACTED] and the foreign employer.

The petitioner submitted an operating agreement for [REDACTED] dated October 8, 2000 showing 50/50 ownership in the limited liability company between a [REDACTED] and a [REDACTED]. Petitioner also submitted an addendum to the aforementioned operating agreement dated July 1, 2003 whereby the ownership of [REDACTED] was modified to 51% ownership by the petitioner; 24.5% ownership by [REDACTED] and a remaining interest of 24.5% owned by [REDACTED]. However, the aforementioned addendum is of questionable credibility considering it makes no reference to the original operating agreement and is unsigned. Further, the petitioner does not provide supporting documentation related to this change in ownership, such as consideration paid by the petitioner for this controlling interest in [REDACTED] minutes of the petitioner or [REDACTED] documenting the transaction; or other such supporting evidence. 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)). Additionally, the petitioner provided IRS Form 1065 Return of Partnership Income documentation related to [REDACTED] from 2005 through 2007. However, each of the Form 1065's reflects a 50/50 ownership structure by and between [REDACTED]; and not the

51% controlling interest claimed to be held by the petitioner as of July 2003. Indeed, the director was well aware of the discrepancy and requested that the petitioner provide an explanation regarding this discrepancy in response to the Request for Evidence (RFE). However, the petitioner provided no such explanation in response to the director's RFE. 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). Further, the petitioner does not address the aforementioned discrepancy on appeal despite it being a central part of the director's denial. 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. 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. 582, 591-92 (BIA 1988). In sum, the discrepancies in the record related to the ownership of the entity for which the beneficiary will work casts doubt as to whether he will be employed with a qualifying entity as required by the Act.

As noted, the petitioner again submits only a stock certificate showing that the foreign employer owns all 10,000 shares in the petitioner claiming this sufficient to establish the required qualifying relationship. But, as general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, *supra*. Without full disclosure of all relevant documents, USCIS 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(l)(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. As noted by the director in the present matter, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest. However, the petitioner did not provide evidence beyond the stock certificates to establish that the petitioner is wholly owned by the foreign employer as asserted. Although it is perhaps understandable that the petitioner might not have documentation from the 1980's reflecting consideration paid by the foreign employer for the 10,000 shares in the petitioner, as asserted by counsel, this does not explain the total absence of any other supporting documentation illustrating that the foreign employer wholly owns the petitioner. For instance, as directly requested by the director, the petitioner could have submitted a stock purchase agreement, minutes of shareholder meetings, a stock ledger, or other legal documents governing the foreign employer's acquisition of the petitioner. Again, 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). Further, the unrelated and unexplained transference of money by and between the foreign employer and petitioner, as submitted by the petitioner, is not sufficient to establish that the foreign employer wholly owns the petitioner. As such, the petitioner has not submitted sufficient evidence beyond the stock certificates to establish that the foreign employer wholly owns the petitioner as claimed.

Lastly, the director noted that the petitioner established itself as an S corporation, and thusly could not be owned by a foreign corporation as stated on the record. The AAO also concurs with this conclusion on the part of the director. As noted, the petitioner claims that it is a wholly-owned subsidiary of the foreign employer. Further, the petitioner's articles of incorporation show that the petitioner was incorporated as S corporation. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved and casts serious doubt on the actual ownership of the petitioner. 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. 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. 582, 591-92 (BIA 1988).

In sum, the AAO concurs with the director's finding that the petitioner has failed to establish the required qualifying relationship between the petitioner and the foreign employer due the discrepancies on the record related to the petitioner, and its claimed subsidiary [REDACTED] and the insufficient evidence on the record to establish that the petitioner is wholly owned by the foreign employer. For this reason, the appeal must be dismissed.

B. Specialized knowledge capacity with the petitioner

The director also denied the petition, finding that the petitioner had failed to establish that the beneficiary will be employed in the United States in a specialized knowledge capacity.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The petitioner claims to own a limited liability company, [REDACTED], which operates a Southern Indian vegetarian food restaurant that the petitioner claims is based on unique recipes owned by the foreign employer. The petitioner employs nine employees and earned \$488,407.00 in revenue in 2007. The petitioner stated the beneficiary will be working as a Southern Indian Vegetarian Specialty Cook. The petitioner further provided a description of the beneficiary's specialized knowledge as follows:

[The beneficiary] is a specialized foreign specialized chef who prepares dishes served only in [foreign employer] restaurants. Presently his specialized knowledge is needed for the [petitioner] restaurant in Santa Clara. He has expertise and experience in the [foreign employer] style and philosophy of cooking which us of a very high standard. [Foreign employer] restaurants serve vegetarian style cuisine of which [the beneficiary] has had 8 years experience in the Indian company. His specialized knowledge of cooking and service is a key factor in ensuring the success of the petitioner restaurant. The success of [the petitioner and foreign employer] has been built on authenticity and quality.

The director issued an RFE requesting that the petitioner provide, *inter alia*, evidence that the beneficiary has specialized knowledge and evidence of the proposed specialized knowledge position in the United States. More specifically, the director requested some of the following: (1) detailed duties in the United States; (2) an explanation of how such duties are special or advanced; (3) a detailed explanation of the petitioner's product; (4) the beneficiary's training and experience; and (5) the potential impact of the petitioner's business if the petition were not approved. In response to the RFE, the petitioner offered that the [REDACTED] (or the foreign employer) method of cooking was unique; and claimed to be based on secret recipes created by the foreign employer's founder which were inspired by certain Hindu religious precepts. The petitioner asserts that no other restaurant may serve these dishes being that the name [REDACTED] is trademarked in India and the United States. Further, the petitioner further explained the beneficiary's claimed expertise as follows:

The [family which founded the foreign employer] is very careful to be sure that the holy name and sacred precepts of the founder are not violated. Therefore, [the beneficiary] is not just a cook following a recipe book. He is a SPECIALIZED FOREIGN

SPECIALITY CHEF who prepares dishes only in [foreign employer] restaurants. He is also irreplaceable. There are no such persons available to the petitioner in the United States presently without bringing over at least one of its chefs from India to train people here it will be literally unable to continue its business.

The director ultimately denied the petition, concluding that the evidence submitted by the petitioner was insufficient to show that the beneficiary's experience constituted specialized knowledge consistent with the Act. The director reasoned that the record failed to establish that the beneficiary had unusual, advanced or unique knowledge to qualify as specialized knowledge pursuant to the Act.

On appeal, counsel asserts that the beneficiary does indeed have specialized knowledge as defined by the Act due to the exclusive nature of his training in the foreign employer's secret recipes. Counsel further maintains that the aforementioned cooking techniques are sufficiently unique because the name [redacted] has been trademarked in the United States and India thereby preventing others from using these specialized recipes.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary possesses specialized knowledge or that he would be employed in the United States in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

In visa petition proceedings, the burden is on the petitioner to establish eligibility. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

In order to establish eligibility, the petitioner must show that the individual will be employed in a specialized knowledge capacity. 8 C.F.R. § 214.2(l)(3)(ii). The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." *See also* 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary and the proffered position satisfy either prong of the definition.

As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against that of others in the petitioning company and/or against others holding comparable positions in the industry. The ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that

the beneficiary's knowledge or expertise is advanced or special, and that the beneficiary's position requires such knowledge. Further, USCIS will assess the totality of the circumstances; taking into account: (1) the extent of the beneficiary's experience; (2) the beneficiary's level of training, education of technical expertise; (3) whether the product or process the beneficiary has experience in is noteworthy or uncommon; (4) whether the petitioner could impart the knowledge to another with/without significant economic impact; (5) whether the knowledge is generally found in the industry; and (6) whether the knowledge is of some level of complexity.

In the present case, the petitioner's claims are based on the second prong of the statutory definition, asserting that the beneficiary has an advanced level of knowledge of the company's processes and procedures, namely, the religiously inspired Southern Indian vegetarian food recipes claimed to be uniquely held by the foreign employer. However, the petitioner has not presented sufficient evidence, beyond its own declarations, to establish that the beneficiary's knowledge of Southern Indian vegetarian recipes is complex or uncommon. Although the petitioner vaguely describes the religious inspiration behind the foreign employer recipes known by the beneficiary, no supporting evidence is provided to make a determination as to whether these recipes are in fact unique or uncommon. Further, the petitioner has not sufficiently explained the extent of the beneficiary's experience and training beyond simply stating he has eight to ten years of experience. Additionally, the petitioner has not provided any comparison of the beneficiary's claimed expertise against other employees within the petitioner or the foreign employer's organization in order to determine that the beneficiary's knowledge is indeed unique or special within that organization or in the marketplace. As such, beyond the petitioner's own declarations, there is little evidence on the record to determine whether the beneficiary knowledge is specialized as defined by the Act. 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)).

It is not enough to simply state that a beneficiary's knowledge is unique, uncommon, or specialized; that the business has been successful using certain knowledge over an extended period; or that the name of the business is trademarked. In fact, the aforementioned attributes could explain any successful restaurant. Further, USCIS sees little relevance in the trademarked name [REDACTED] in establishing that the beneficiary's knowledge is noteworthy, unique or uncommon, as noted by counsel. In fact, a trademark only protects the business name itself from use by others, not the proprietary information or knowledge of such an entity. Although the petitioner vaguely references the recipe knowledge as being proprietary or even patented, the record does include sufficient supporting evidence to determine whether this is probably true. Therefore, the statement on the part of the petitioner that the referenced recipes or cooking techniques are protected from use by others, or that [REDACTED] is in fact a completely unique and protected method of cooking, are not adequately supported. Indeed, there is little to differentiate the specified petitioner recipes or cooking techniques from any other Southern Indian cuisine. In sum, the record suggests that the petitioner could impart the recipes or cooking methods to another without substantial hardship or cost.

For the reasons discussed above, the evidence submitted fails to establish that the beneficiary possesses

specialized knowledge and will be employed in a specialized knowledge capacity with the petitioner in the United States. *See* Section 214(c)(2)(B) of the Act. Accordingly, the appeal will be dismissed.

IV. Conclusion

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 the petitioner has not met that burden.

ORDER: The appeal is dismissed.