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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC 00 005 54123 Office: VERMONT SERVICE CENTER Date: 22 JAN 2002

IN RE: PETITIONER: [Redacted]
BENEFICIARY: [Redacted]

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

IN BEHALF OF PETITIONER:
[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Weimann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as an export company. The petitioner seeks to employ the beneficiary in the United States as its director and export manager. The director determined that the petitioner had not submitted sufficient evidence to establish a qualifying relationship between itself and a foreign entity. The director also determined that the foreign entity appeared to be a company of limited resources and that it was unclear how the foreign entity supported the petitioner.

On appeal, counsel for the petitioner asserts that the director's decision was improper.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(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 (1)(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.

The petitioner was incorporated in the state of New York in May of 1999. The petition was filed in October of 1999. The petitioner requests employment for the beneficiary as an L-1 intracompany transferee. The petitioner qualifies under the new office definition in 8 C.F.R. 214.2(1)(1)(ii) that states in pertinent part that:

(F) New office means an organization which has been doing business in the United States through a parent,

branch, affiliate, or subsidiary for less than one year.

The first issue in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

8 C.F.R. 214.2(1)(1)(ii)(G) states:

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 (1)(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; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(1)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(1)(1)(ii)(J) states:

Branch means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(1)(1)(ii)(K) states:

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.

8 C.F.R. 214.2(1)(1)(ii)(L) states, in pertinent part:

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.

In this case the petitioner initially stated in the petition that the beneficiary owned 32 percent of the foreign entity and 60 percent of itself, the United States entity. The petitioner provided no other evidence of its ownership and control.

The director requested additional evidence on the issue of a qualifying relationship including share certificates, stock ledgers and other evidence documenting ownership and control of the petitioner and the foreign entity.

In response, the petitioner submitted its bylaws and copies of three share certificates. Share certificate number 01 was issued to OOO Firm Florin, the foreign entity in this case, in the amount of 120 shares on May 22, 1999. Share certificate number 02 was issued to [REDACTED] in the amount of 40 shares on May 22, 1999. Share certificate number 03 was issued to [REDACTED], the beneficiary in this case, in the amount of 40 shares on May 22, 1999. The petitioner also provided the stock transfer ledger indicating that each of the shareholders had paid one dollar for the shares issued. No other information was provided to clarify the ownership and control of the petitioner and the foreign entity.

The director determined that the information provided by the petitioner was inconsistent and as such the petitioner had not established that a qualifying relationship existed between the United States entity and the foreign entity.

On appeal, counsel for the petitioner asserts that the foreign entity owns 60 percent of the petitioner and that the petitioner is clearly a subsidiary of the foreign entity.

Counsel's assertions are not persuasive. Regulation 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 a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings). In the case at hand, the petitioner has submitted inconsistent information. In the petition, the petitioner states that the beneficiary is the owner of 60 percent of its shares. In response to the director's request for evidence, the petitioner submits share certificates and a stock ledger that indicate the beneficiary owns only 20 percent of its shares and the foreign entity owns 60 percent of its shares. The

petitioner does not attempt to explain the inconsistent information. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

In view of the inconsistencies in the petition, the stock certificates and ledger alone are insufficient to clarify ownership and control of the petitioner. The minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to each shareholder, and the subsequent percentage of 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, the Service is unable to determine the elements of ownership and control. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 BIA 1980).

In addition, the petitioner has not provided evidence that payment for the shares of the petitioner has been made although the director requested this evidence. A failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. 103.2(b)(14).

On review, the record is insufficient to demonstrate the petitioner and the foreign entity are qualifying organizations.

The second issue in this proceeding is whether the petitioner has provided sufficient evidence to comply with the requirements set forth in 8 C.F.R. 214.2(l)(3)(v) relating to the criteria for a new office in the United States.

8 C.F.R. 214.2(l)(3)(v) states that if a 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 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 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 (1)(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 petitioner initially submitted an unaudited statement of financial results for the foreign entity in this case. The statement, in addition to being unaudited, made reference to earnings in rubles rather than in dollars.

The director requested additional information on this issue, including evidence that established the size of the United States investment and the financial ability of the foreign organization to remunerate the beneficiary and commence doing business in the United States. The director also requested that the petitioner provide copies of cancelled checks, monetary transfers, or other financial documents that were used by the foreign entity to fund the incorporation of the United States entity. The director also requested that the numbers on the financial statement be converted from rubles to dollars.

In reply, the petitioner submitted an unaudited statement of financial results in dollars as well as rubles. The petitioner also submitted an unidentified and untranslated list of figures accompanied by a short statement from the unidentified head of a financial department. The translated statement in full is as follows: "The line # 251 Investments into dependent companies miens [sic], that dependent company is [redacted] Corp., which located [sic] in the USA. The amount of investment included 4,420,000 rubl., or \$210,476." This statement apparently refers to the unidentified and untranslated list of figures that does show a line #251.

The director determined that the financial information provided by the petitioner indicated that the foreign entity had a limited business income. The director further noted that it was unclear how a company with limited resources could have provided \$97,430 to the petitioner's combined accounts.

On appeal, counsel for the petitioner asserts that the financial statement provided by the petitioner indicates that the foreign entity was not suffering from limited income. Counsel also asserts that the foreign entity was in possession of adequate funds to establish the accounts for the petitioner.

Counsel's assertions are not persuasive. The petitioner has not supplied sufficient documentation of the claimed investment by the foreign entity into the new office. The unaudited statement of financial results of the foreign company and the untranslated and unidentified list of figures are not adequate to support a finding that the foreign entity has the financial ability to remunerate the beneficiary and to commence doing business in the United States. Counsel's assertion to the contrary does not provide further evidence. See Matter of Obaigbena supra. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

On review, the record as presently constituted does not establish that the foreign entity has the financial ability to commence doing business in the United States. Thus the record does not support a finding that the United States office will support a managerial or executive position within one year of approval of the petition.

Beyond the decision of the director, the record does not clearly set forth a business plan for the petitioner that details the nature of the United States office and describes the scope of the office and its financial goals. In addition, the record contains insufficient information to demonstrate that the beneficiary was employed in a managerial or executive for one continuous year in the three year period preceding the filing of the petition. As the appeal will be dismissed for the reasons stated above, these issues need not be examined further.

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.