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

D-7

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 125 51907 Office: TEXAS SERVICE CENTER Date: AUG 0 4 2004

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)

ON 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, Director
Administrative Appeals Office

PUBLIC COPY

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking authorization 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 is a corporation organized in the State of Texas and claims to be engaged in the industrial production of chemicals and the import and export of chemicals for various industries.

The director denied the petition concluding that the petitioner had not established that a qualifying relationship exists between the U.S. entity and the beneficiary's foreign employer.

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 disputes the director's findings and submits additional documentation.

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.

The regulations at 8 C.F.R. § 214.2(l)(3)(v) state that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office 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 (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.

At issue in this proceeding is whether a qualifying relationship exists between the U.S. petitioner and a foreign entity.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

> *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; and
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> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(I) state:

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

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(J) state:

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

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(K) state:

> *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.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(L) state, 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 the initial petition, the petitioner claimed that its ownership was broken down as follows: ten percent was owned by [redacted] 60 percent was owned by [redacted] and 30 percent was owned by the beneficiary's foreign employer. In regard to the foreign entity, the petitioner claimed the following ownership: 70 percent was owned by [redacted] 20 percent was owned by the beneficiary; five percent was owned by "directors;" and another 5 percent was owned by "Emp." The petitioner did not individually specify who the "directors" are; nor did it explain what "Emp" represents.

The record reflects that on September 30, 2002, the director issued a request for additional evidence. The petitioner was specifically asked to submit stock certificates establishing the ownership of the foreign and U.S. entities.

The petitioner responded by submitting three stock certificates, each giving the foreign entity 100,000 shares of the petitioner's stock, totaling 300,000 shares. The petitioner did not submit any information addressing the issue of the foreign entity's ownership.

After reviewing the documentation submitted, the director denied the petition concluding that the petitioner failed to establish the existence of a qualifying relationship.

On appeal, counsel states that the petitioner is now the foreign company's subsidiary and claims that this relationship was the result of a stock transfer that took place on January 6, 2003, ten months after the petition was filed. However, regardless of the events that took place altering the petitioner's ownership and control, 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, regardless of the ownership breakdown that is reflected in the transfer document dated January 6, 2003, the petitioner did not claim at the time of the appeal that it was a subsidiary of a foreign entity.

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 immigrant visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). 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, supra* at 595. In the instant case, the petitioner initially claimed that the beneficiary

owned and controlled a majority of its shares, while the majority of the foreign entity was owned and controlled by a different individual whose ownership interest in the U.S. petitioner totaled only ten percent of the petitioner's shares. Thus, based on the petitioner's own claim, it did not fall under the definitions of parent, subsidiary, affiliate, or branch as defined above. *See* 8 C.F.R. § 214.2(l)(1)(ii)(I), (J), (K), and (L).

Furthermore, the stock certificates submitted in response to the director's request for additional evidence only indicate that the foreign entity owns 300,000 shares of the petitioner's stock. There is no indication that 300,000 shares is equivalent to 30 percent of the issued shares, as initially claimed in the petition. Nor did the petitioner submit any stock certificates reflecting the ownership interests of the remaining parties that were named in the petition. 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 the instant case, the petitioner neither acknowledges nor does it provide any evidence to resolve the considerable inconsistencies discussed above.

On review, the record lacks sufficient evidence to demonstrate that a qualifying relationship exists between the U.S. petitioner and the beneficiary's foreign employer. As such, the instant petition cannot be approved.

Beyond the decision of the director, the record shows that in addition to the stock certificates, the request for additional evidence also instructed the petitioner to submit a copy of its lease agreement. The petitioner complied with that request by submitting a lease that indicated that the lease term would begin on August 30, 2002, approximately five months after the petition was filed. Although the agreement was entered into prior to the commencement period, the AAO cannot conclude that the petitioner had sufficient premises to house its business when the petition was filed. *See* 8 C.F.R. § 214.2(l)(3)(v)(A). It is noted that 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). As such, due to the additional grounds discussed in this paragraph, this petition cannot be approved.

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.