



U.S. Citizenship
and Immigration
Services

27



FILE: SRC 02 181 53002 Office: TEXAS SERVICE CENTER Date:

405 3 1 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

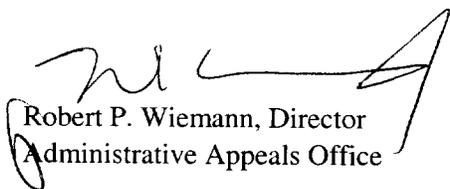
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-PETITIONER

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

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 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 § 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 Florida that sells bicycles and bicycle parts. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Guayas, Ecuador. The petitioner now seeks to employ the beneficiary as its president.

The director denied the petition, concluding that the petitioner failed to establish that: (1) the foreign and U.S. entities are qualifying organizations; (2) the petitioner secured sufficient U.S. premises to house the new office; (3) the size of the U.S. investment and the financial ability of the foreign entity are sufficient to support the beneficiary in a primarily managerial or executive position within one year of approval of the petition; (4) the beneficiary was employed abroad and would be employed in the United States in a primarily managerial or executive capacity; and (5) the beneficiary's assignment in the United States would be temporary.

On appeal, the petitioner states that the previously submitted evidence, such as the petitioner's corporate tax returns, contained "several errors." The petitioner submits on appeal the petitioner's corrected tax returns, and "letters from the respective entities showing mistakes that were made" and have since been resolved.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), 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 involved executive or managerial authority over the new operation;
- (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.

The petitioner did not specifically address on appeal the following issues raised by the director in her decision: (1) the beneficiary's previous employment abroad or proposed employment in the United States in a primarily managerial or executive capacity; (2) the sufficiency of the U.S. investment and the foreign entity's financial ability to remunerate the beneficiary and commence doing business in the United States; (3) the foreign business' operations during the beneficiary's absence; and (4) whether the beneficiary's assignment in the United States is temporary. The petitioner has essentially conceded that the director's findings related to these issues are correct. Therefore, the director's decision on these issues will be affirmed.

The first issue the AAO will address is whether the foreign and U.S. entities are qualifying organizations as required in the Act at section 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(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; and,

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

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(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.

In an undated letter submitted with the nonimmigrant petition, the petitioner stated that the parent-subsidiary relationship between the foreign and U.S. entities is apparent from the previously submitted articles of incorporation, stock certificates, and financial documents. In a separate letter also submitted with the petition, the petitioner indicated that the beneficiary had a 60% ownership interest in the petitioning organization. The petitioner submitted the U.S. company's articles of incorporation, which state in article three that the petitioner has the authority to issue 10,000 shares of common stock at a par value of \$1.00 per share. On Schedule E of the attached Internal Revenue Service Form 1120, U.S. Corporation Income Tax Return, the beneficiary was identified as the owner of 50% of the petitioning organization's stock; the beneficiary's wife was identified as the owner of the remaining stock interest.

In a request for additional evidence, dated August 6, 2002, the director asked that the petitioner submit the following evidence to establish a qualifying relationship between the two entities: (1) documentation, such as stock certificates, corporate by-laws, or published annual reports, which identify the current ownership and control of the U.S. and foreign entities; (2) an explanation whether the beneficiary's foreign employer, as a sole proprietorship, may legally purchase a stock ownership in the petitioning organization; and (3) wire transfers, financial records, bank statements, and profit and loss statements identifying the funding or capitalization of the U.S. corporation.

In response to the director's request for evidence, the petitioner submitted the articles of incorporation, stock certificates, and "division of corporations" web page. The two stock certificates identified the beneficiary and his wife as the owners of 6,000 and 4,000 shares of the U.S. corporation's stock, respectively. The petitioner also submitted a translated document titled "Data Updating for the R.U.C.," which identifies the beneficiary's foreign employer as a sole proprietorship.

In addition, the petitioner provided four bank statements reflecting the petitioner's account balances on September 19, 2001, and March 12, May 2, and July 3, 2002. Also provided as part of the record were two copies of customer transfers from an [REDACTED] account in [REDACTED]. One transfer, which originated from the beneficiary, took place on July 3, 2002 in the amount of \$4,140. The second transfer form is not legible.

In a decision dated January 6, 2003, the director concluded that the petitioner did not establish that a qualifying relationship exists between the beneficiary's foreign employer and the petitioner. The director noted several discrepancies in the record that undermined the petitioner's assertion that a parent-subsidary relationship exists between the two companies. Specifically, the petitioner's year 2001 corporate tax return identified the beneficiary and his wife as equal owners of the U.S. corporation, while the stock certificates identify the beneficiary as the owner of 60% of the issued stock. The director also noted that the petitioner incorrectly referred to the majority shareholder of the U.S. corporation as the beneficiary's foreign employer, rather than the beneficiary himself. The director acknowledged the submitted stock certificates, yet stated that Citizenship and Immigration Services (CIS) generally does not consider stock certificates alone sufficient evidence for establishing a qualifying relationship. Accordingly, the director denied the petition.

On appeal, the petitioner states that the previously submitted evidence contained errors that have since been corrected. In a January 29, 2003 letter submitted on appeal, the petitioner's accountant summarized changes made to the petitioner's 2001 corporate tax return, including a notation on Schedule K that 60% rather than 50% of the U.S. corporation is owned by a foreign individual. Additionally, the accountant states that Schedule L was revised to reflect common stock in the amount of \$10,000 rather than the \$5,995 previously reported. The petitioner submits the "amended" corporate tax return for the year 2001, and the petitioner's 2002 corporate tax return.

On review, the record is not persuasive in establishing a qualifying relationship between the beneficiary's foreign employer and the U.S. corporation. The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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.

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.*, at 364-365. Without full disclosure of all relevant documents, CIS 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 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 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.

In the present matter, the petitioner is relying solely on the stock certificates and revised tax return submitted on appeal to demonstrate the existence of a qualifying relationship. Although requested by the director, the petitioner failed to submit sufficient evidence of money or consideration paid for ownership in the petitioning organization. Neither the bank statements nor the two wire transfers correspond to the date at which the stock certificates were issued, June 30, 2001; each is dated at least three months to a year after the purchase of the stock. Also, there is no financial documentation of the petitioning organization being funded by the beneficiary as the sole proprietor of the beneficiary's foreign employer. Moreover, the petitioner's claim in its response to the director's request for evidence that "[the beneficiary] brought money in his last entry" has no bearing on this issue. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The 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).

Furthermore, the "amended" tax return provided by the petitioner on appeal is not sufficient to clarify the inconsistencies addressed by the director in her decision. The submitted tax return contains the hand-written word "amended" on the top of the form and is stamp-marked "copy" on the bottom of the first page. It appears as if the petitioner simply made the changes noted by the director in an attempt to conform to the requirements for establishing a qualifying relationship. Additionally, there is no evidence that the revised tax return was in fact filed with the Internal Revenue Service. The Internal Revenue Service requires that revisions to a previously filed Form 1120 be made on Form 1120X, Amended U.S. Corporation Tax Return, and subsequently resubmitted. *See* Internal Revenue Service, Department of the Treasury, Forms and Instructions, www.irs.gov/formspubs. The certified copies of the tax returns would demonstrate the ownership interests the petitioner reported to the IRS and further reveal that it had actually filed tax returns in the course of doing business. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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). The petitioner in the present matter failed to clarify the inconsistent and conflicting testimony by independent and objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the foregoing analysis, the record does not establish a qualifying relationship between the beneficiary's foreign employer and the U.S. corporation. For this reason, the appeal will be denied.

The AAO will next address the issue of whether the petitioning organization secured sufficient physical premises to house the new U.S. office.

In her request for additional evidence, the director asked that the petitioner submit a commercial lease as evidence of acquiring premises for the U.S. office. In response, the petitioner provided a lease dated July 1, 2002, for premises at [REDACTED] Florida. A Certificate of Registration submitted by the petitioner identified the petitioner's business location at the same address. The petitioner also provided invoices, which identified [REDACTED] as the petitioner's business address.

In the decision, the director noted that the petitioner's commercial lease was not witnessed or dated. The director also noted a discrepancy in a newspaper advertisement submitted by the petitioner that identified the petitioner's address as [REDACTED]. The director therefore determined that the petitioner had not secured physical premises sufficient to house the new office.

On appeal, the petitioner submits a letter from the newspaper agency, in which it acknowledges a printing mistake in the petitioner's address on the newspaper advertisement.

On review, the petitioner has not demonstrated that sufficient office premises were obtained at the time of filing the petition. It is a well-established rule 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). While the petitioner in the instant matter provided a commercial lease and documentation verifying that office premises had been acquired, the lease is dated more than a month after the date of filing the nonimmigrant petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For this additional reason, the appeal will be denied.

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.