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

U.S. Citizenship and Immigration Services

[redacted]

JUN 18 2004

FILE: SRC 03 173 54628 Office: TEXAS SERVICE CENTER Date:

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:

SELF-REPRESENTED

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 appeal will be dismissed.

The petitioner claims to be in the business of automobile detailing, landscaping, and operating an ink store and a tool store. It seeks to employ the beneficiary temporarily in the United States as its president and general manager. The director determined that the petitioner had failed to establish that: (1) a qualifying relationship existed between the U.S. and foreign entities; and (2) sufficient funding and capitalization to commence business in the United States had been obtained.

On appeal, the petitioner disagrees with the director's decision and states that a qualifying relationship does exist between the U.S. and foreign entities and that the U.S. entity has secured sufficient funding and capitalization to commence business in the United States.

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 regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

> *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

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 (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.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves 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(1)(3)(v) states 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.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2003. The petitioner declares two employees. The petitioner seeks the beneficiary's services as a president and general manager in order to open a new office for a period of one year, at a weekly salary of $1,200.00.

The first issue in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

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

(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) define, in pertinent part, "parent," "branch," "subsidiary," and "affiliate" as:

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

(J) *Branch* means an operation 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 the instant matter, the petitioner claims to be a subsidiary of the foreign entity. The petitioner submitted a copy of the U.S. entity's Articles of Incorporation, which show that the entity is authorized to issue a total of 1,000 shares of stock. The petitioner stated in a letter of support that the U.S. entity was 100 percent owned by the foreign entity. The petitioner also stated that the beneficiary owns 33.4 percent of the foreign entity. The petitioner submitted a translated copy of the foreign entity's Articles of Incorporation, which show that the company is authorized to issue 1,500 shares of stock at a par value of $12.50. A clause within the foreign entity's articles shows that: (1) Angelina Mondelly subscribed and purchased 250 shares; (2) Milagros Villalobos subscribed and purchased 750 shares; (3) Felix Pitalua subscribed and purchased 250 shares; and (4) Vinicio Cascioli subscribed and purchased 250 shares.

The director determined that additional documentation was needed from the petitioner in order to complete the processing of the petition. The director specifically requested that the petitioner submit evidence of the stock certificates, stock register, or copies of published annual reports which indicate a parent-subsidiary qualifying relationship and the percent of ownership held by the parent corporation.

In response to the director's request for additional evidence, the petitioner declined to submit copies of its stock certificates, register, or annual report. Instead, the petitioner stated that the beneficiary had a 33.4 percent proprietary interest in the foreign entity, along with Luis Adafel Vargas Suarez, Milagros Coromoto, and Villalobos Medina. The petitioner also stated that the U.S. entity stock was owned by the foreign entity. The petitioner submitted a translated version of an Act of the Assembly in Venezuela that serves as a certification that

the beneficiary owns 33.4 percent of stock of the foreign entity. The petitioner also resubmitted a copy of the U.S. entity's Articles of Incorporation.

The director denied the petition after determining that the record did not establish that a qualifying relationship exists between the U.S. and foreign entities. The director stated that the statement alluding to the beneficiary's owning 33.4 percent of the foreign company was insufficient to establish that a bona fide relationship existed between the U.S. and foreign entities.

On appeal, the petitioner disagrees with the director's decision.

The petitioner has not submitted sufficient evidence to establish that a qualifying relationship exists between the U.S. and foreign entities. The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U.S. and foreign entities for purposes of a nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. 362 (Comm. 1986); *Matter of Hughes,* 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International,* 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant 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.* In the instant matter, the petitioner has not submitted sufficient proof of stock purchase by the foreign entity.

There has been no company by-laws, tax records, stock certificates, stock certificate registry, purchase of shares agreements, bank statements, cancelled checks or any other business documents presented to substantiate the purchase of U.S. entity stock by the foreign entity. There are no certified meeting minutes that demonstrate the foreign entity's interest in purchasing shares of stock in the U.S. entity, nor has there been evidence presented to show an agreement by the directors and shareholders of the foreign entity to purchase such stock. Neither does the record establish that the control of the entity is *de jure* or *de facto,* or to what extent proxy votes are utilized. *Matter of Hughes,* 18 I&N Dec. 289 (BIA 1982).

Although specifically requested by the director, the petitioner failed to submit copies of its issued stock certificates. 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).

The evidence submitted by the petitioner did not address the question of whether the U.S. and foreign entities present a parent-subsidiary relationship. There has been no evidence presented to establish who controls company policies and procedures, production, customer service, and advertising with regard to the U.S. entity's operations. Likewise, evidence of record fails to show who owns stock in the U.S. entity. Claims of ownership and control without independent documentary evidence to substantiate such an allegation 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).

Likewise, the petitioner has failed to establish that there is an affiliate relationship between the U.S. and foreign entities as the record does not show that both entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity.

Upon review of the entire record, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign entities.

A second issue in this proceeding is whether the petitioner has complied with 8 C.F.R. § 214.2(1)(3)(v) as a new office petition, by submitting evidence to establish that sufficient funding or capitalization had been secured by the U.S. entity to commence doing business in the United States.

The director determined that additional documentation was needed from the petitioner in order to complete the processing of the petition. The director specifically requested that the petitioner submit evidence of the funding or capitalization of the United States entity, such as wire transfers showing transfers of funds from a foreign organization, evidence of financial resources committed by the foreign company, copies of bank statements for checking/and savings accounts, profit and loss statements or other accountant's reports.

In response to the director's request for additional evidence, the petitioner submitted copies of bank statements for the U.S. entity from Bank of America, and copies of bank statements for the foreign entity from Eastern National Bank in the United States.

The director determined that the evidence submitted was not sufficient to establish that the petitioner had sufficiently complied with 8 C.F.R. § 214.2(1)(3)(v) concerning funding for and capitalization of the U.S. entity.

On appeal, the petitioner disagrees with the director's decision and states that sufficient funding for and capitalization of the U.S. entity has been provided. The petitioner submits copies of bank statements from Bank of America dated October 28, 2003, to show that a wire transfer of funds took place from the foreign entity's bank account in the United States to the U.S. entity's bank account.

The petitioner's assertion is not persuasive. After the director specifically requested additional documentation on this issue the petitioner failed to submit sufficient evidence. On appeal, the petitioner relies on evidence that was requested but not produced until after the initial decision to deny the petition was made by the director. The petitioner submitted bank statements, which show that a wire transfer from the foreign entity's bank account in the United States to the U.S. entity's bank account took place on October 28, 2003. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Citizenship and Immigration Services (CIS) cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille,* 18 I&N 114, 115 (BIA 1981). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). In the instant case AAO is not required to consider new evidence submitted on appeal in an effort to compensate for the petitioner's frailties. *Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988).

Although the petitioner infers that the regulations do not require that the business be fully funded at the time of the application, it is necessary for the petitioner to establish from the onset that the new office has been adequately funded to commence doing business in the United States. 8 C.F.R. § 214.2(1)(3)(v)(C)*(2)*. Evidence of a subsequent wire transfer to the U.S. entity is not sufficient to establish that the organization was adequately funded or had received sufficient capital to commence doing business at the time the petition was filed.

In review of the entire record, the petitioner has failed to submit sufficient evidence to establish that it has sufficient funding or capitalization to commence doing business in the United States. The petitioner has also failed to submit sufficient evidence to show that the U.S. and foreign entities have a qualifying relationship. Therefore, the appeal must be dismissed.

Beyond the decision of the director, the petitioner has failed to establish that the foreign entity has been doing business in a regular, systematic, and continuous manner, as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). Although specifically requested by the director, the petitioner has failed to submit evidence of the foreign entity doing business. The petitioner submitted a number of untranslated and illegible business documents. There is no evidence of current financial records, employee rosters, annual reports, company invoices, bills of sale, product brochures, or other evidence of business conducted by the foreign entity. Additionally, the record does not establish that the petitioner has secured sufficient physical premises to house the new office. 8 C.F.R. § 214.2(1)(3)(v). The petitioner stated that its U.S. business would consist of automobile detailing, landscaping services, an ink store, and a tool store. The petitioner submitted a copy of a lease agreement which states, in part, that the "lessee shall use and occupy the premises for Small business . . . ." The petitioner also submitted photographs of the leased space. This evidence demonstrates that the leased premises are not adequate to house more than two persons. There is no evidence to show that the petitioner has leased sufficient space to house its inventory, service areas, equipment or machinery needed to effectively operate the business.

Furthermore, there has been insufficient evidence submitted to establish that the beneficiary has performed managerial or executive duties for one consecutive year for a qualifying company abroad, within three years preceding the filing of the petition. Likewise, there is insufficient evidence to show that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity; that the U.S. entity will be able to remunerate the beneficiary for her services, or that it will be able to support a managerial or executive position within one year of operation as defined at section 101(a)(44) of the Act. Finally, the record does not establish that the beneficiary's services are to be used for a temporary period and that she will be transferred to an assignment abroad upon the completion of the temporary services in the United States pursuant to 8 C.F.R. § 214.2(l)(3)(vii). For these additional reasons, the petition may not be approved and the appeal must be dismissed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.