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U.S. Citizenship
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MAY 25 2004

FILE: EAC 97 252 54448 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
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:

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, The Golden Horn LLC, endeavors to classify the beneficiary as a manager or executive 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 claims that it is an affiliate of Yurt Hali Kilim San ve Ticaret Limited, located in Turkey, and is engaged in the business of selling, repairing, and restoring Turkish rugs and kilims. It seeks to extend the petition's validity and the beneficiary's stay for three years as the U.S. entity's antique rug appraiser, restoration, and sales consultant.

On January 23, 1998, the director determined that the petitioner failed to establish a qualifying relationship with the foreign entity.

On appeal, the petitioner's counsel claims that the petitioner has a qualifying relationship with the foreign entity.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(3) state 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.

Further, the regulations at 8 C.F.R. § 214.2(l)(14)(ii) require that a visa petition under section 101(a)(15)(L) of the Act which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

> (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
>
> (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue in this proceeding is whether a qualifying relationship exists between the petitioner and foreign entity. The regulation at 8 C.F.R. 214.2(l)(1)(ii) provides:

(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 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.

The regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and foreign organization. *See 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 proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology International* at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

On September 30, 1997, CIS received Form I-129. On Form I-129, the petitioner stated:

> [redacted] & [redacted] have equal 50% shares in stock ownership/managerial control of [the foreign entity]. They have equal 33 1/3% shares each in stock ownership [and] managerial control of [the U.S. entity]; George Berk having remaining 33 1/3% shares.

Additionally, in a September 10, 1997 supporting letter, the petitioner asserted that the "majority ownership remains identical as before with M[redacted] and M[redacted] holding equal shares in [the U.S. entity] and in [the foreign entity]."

On October 7, 1997, the director issued a request for additional evidence. Specifically, the director requested additional evidence to establish that a qualifying relationship exists between the petitioner and foreign company. The director also requested a copy of the voting agreement between Mehmet Sahin and Selcuck Atlas.

In response to the request for evidence, the petitioner's counsel stated:

> The issue of qualifying relationship was previously adjudicated in the Initial I-129 L petition that was previously approved by the Vermont Service Center and I direct your attention to the copy of the prior approval notice bearing EAC number 9625850558, attached to the extension petition. The issue of a qualifying relationship between [the U.S. entity] and [foreign entity] has been decided in the favor of the petitioner and is Res Judicata. The [U.S. entity] and [foreign entity] are affiliates. . . . The same group of individuals, Selcuk Aktas and George Berk, own majority interests of the [foreign entity] and [U.S. entity].

In addition, the petitioner submitted a translated copy of the published ownership betwee and The petitioner also claimed that ' has purchased the shares owned by Mehmet Sahim, in both the [U.S. entity] and [foreign entity]. . . . The partners of [the U.S. entity] are and

On January 23, 1998, the director concluded that a qualifying relationship did not exist between the petitioner and the foreign entity. The director found that the petitioner did not submit supporting evidence of the U.S. entity's ownership.

On appeal, counsel claims that a qualifying relationship exists between the petitioner and the foreign entity. The petitioner submits a copy of the ownership agreement of the petitioning company.

On review, the petitioner submitted insufficient evidence to establish that a qualifying relationship exists between the petitioner and the foreign entity. To establish eligibility in this matter, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this proceeding, the petitioner initially claimed that the foreign entity is equally owned by an nd that the U.S. entity is equally owned by and However, in the response to the director's request for additional evidence, the petitioner claimed that the U.S. entity is owned by and and the foreign entity is owned by these same two individuals. The petitioner claimed that as purchased the shares owned by both the [U.S. entity] and [foreign entity]." On appeal, the petitioner claims that the U.S. and foreign entity are 100 percent owned by and However, absent documentary evidence such as a sales agreement detailing the transfer of ownership or voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same individuals control both entities. Additionally, the record lacks the petitioner's articles of incorporation or any minutes from board of directors' meetings. Without supporting documentation, CIS cannot verify whether the petitioner has a qualifying relationship with the foreign entity. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* In sum, the petitioner has failed to establish that a qualifying relationship exists between it and the Turkish company.

Moreover, on appeal, the petitioner submits the original "Second Amendment to Operating Agreement" of the U.S. company to establish that a qualifying relationship exists between the U.S. entity and foreign company. However, the director requested this evidence before he denied the petition. 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). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As in

the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Furthermore, although the document is dated before the filing of the petition, it directly contradicts the petitioner's ownership representations on the Form I-129, thereby raising the question of whether this document was created after the filing of the petition. 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 (BIA 1988). Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

Further, the AAO notes that the current petition is for an extension of a L-1A petition that was previously approved by the director. As a result, counsel in his response to the director's request for additional evidence, claimed that, "The issue of a qualifying relationship between [the U.S. entity] and [foreign entity] has been decided in the favor of the petitioner and is Res Judicata." However, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See* e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

In addition, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director had approved the nonimmigrant petitions on behalf the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 292785 (E.D. La.), aff'd 248 F.3d 1139 (5 th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

After careful consideration of the evidence, the AAO concludes that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign entities. For this reason, the petition may not be approved.

Beyond the decision of the director, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. On Form I-129, the petitioner described the beneficiary's duties as "consults with [and] advise[s] customers on antique rug repair [and] restoration," "act as liaison," and oversee[s] [and] arrange[s] for shipment [and] customs," and "repair and restoration work done in Turkey." These duties are vague. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Additionally, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval

of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this additional reason, the petition may not 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.