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FILE: LIN 02 146 54653 Office: NEBRASKA SERVICE CENTER Date: DEC 21 2005

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

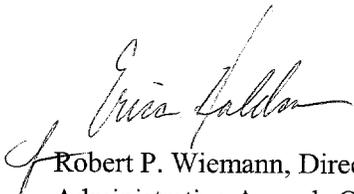
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Nebraska Service Center, denied the nonimmigrant visa petition. The petitioner submitted an appeal to the Administrative Appeals Office (AAO) on February 21, 2003. The AAO affirmed the director's decision on October 28, 2004. The matter is now before the AAO on a motion to reopen and reconsider the previous decision. The motion will be dismissed.

The petitioner avers it is a company organized in the State of Oregon in 1994 which imports and exports commodities. It seeks to employ the beneficiary temporarily as its vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as a 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 claims that it is a 50 percent owned subsidiary of ██████████ located in Khabarovsk, Russia.

The director denied the petition on January 22, 2003, determining that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States petitioner. The AAO dismissed the appeal, affirming the director's decision and also finding that the record did not establish that the petitioner had established a qualifying relationship with the beneficiary's foreign employer or that the beneficiary's duties for the foreign employer were in a managerial or executive capacity.

On motion, counsel for the petitioner submits a brief and documentation. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Furthermore, the regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel for the petitioner disagrees with the director's determination and the AAO's dismissal of the appeal on the issue of the beneficiary's executive capacity. Counsel argues that the beneficiary is directing several major components of the organization and that negotiating shipping rates is a high level, very important aspect of the export business necessitating performance by a company executive. Counsel re-submits several contracts purportedly negotiated by the beneficiary on behalf of the petitioner. Counsel also refers to the petitioner's use of employees, contractors, and sub-contractors to carry out the day-to-day tasks necessary to provide the company's services. Counsel indicates that the beneficiary sets long-term goals and policies and receives little or no supervision in carrying out his duties. Counsel also claims that the beneficiary supervises professional employees as evidenced by the employees' possession of bachelor's degrees or equivalent. Counsel cites unpublished decisions to support the claim that a beneficiary in a small company may qualify as a multinational manager or executive. Counsel adds that the petitioner's business has increased and that with the increase the petitioner has hired additional employees. Counsel contends that the petitioner's growth subsequent to filing the petition is evidence of the level and complexity of the company prior to filing the petition in March 2002.

Counsel does not submit new evidence or state reasons for reconsideration supported by pertinent precedent decisions establishing that the prior decision was based on an incorrect application of law or policy. Counsel's assertions on motion do not address the deficiencies of the record that would substantiate the beneficiary's eligibility for this visa classification. Counsel's reiteration that negotiating contracts in this instance is a high-level duty that can only be carried out by an executive is not substantiated by documentation. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Counsel's reference to employees, professional or otherwise, and intermittently employed contractors hired or utilized after the petition was filed does not establish that the beneficiary's duties were primarily executive when the petition was filed. As indicated in the AAO's decision, 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). The petitioner has not established that when the petition was filed, the beneficiary was relieved from performing the necessary operational activities of the organization.

Finally, counsel's comparison of this matter to unpublished matters is not probative. Unpublished decisions are not binding on Citizenship and Immigration Services (CIS) employees in the administration of the Act. Moreover, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Counsel has not submitted evidence or argument sufficient to require the reopening of this matter. On this issue, the previous decisions of the director and the AAO are affirmed.

Counsel also questions the AAO's decision regarding the petitioner's qualifying relationship with the beneficiary's foreign employer. In this matter counsel claims that the petitioner is a 50-50 joint venture and that both of the 50 percent corporate stockholders possess equal control of the petitioner by virtue of negative control or veto power over the other. However, the petitioner has not supplied evidence that either stockholder has agreed to relinquish his control, such that if the two equal stockholders disagreed, the petitioner could continue operations. The petitioner has not provided evidence that it is a joint venture, but only that it has two stockholders, each holding a 50 percent interest.

Without evidence that one or the other of the stockholders exercises control of the petitioner, the petitioner has not established a qualifying relationship. In this matter, the question of actual control still remains. The record does not include any evidence of voting proxies or other agreements showing that one of the stockholders has relinquished control. The definition of a subsidiary includes a provision for a parent company that owns 50 percent of a 50-50 joint venture. There are no provisions in statute, regulation, or case law that allow for the recognition of veto power of negative control in other than a 50-50 joint venture. Although counsel has alleged that the petitioner is a joint venture, the record does not contain evidence of a joint venture agreement. Without documentary evidence to support the claim, the assertions of counsel will

not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. On this issue, the decision of the AAO is affirmed.

Counsel also questions the AAO's decision that the record did not contain sufficient evidence to establish that the beneficiary's position for the foreign entity was in a managerial or executive capacity. Counsel contends that the beneficiary managed an essential function. However, counsel does not provide new or clarifying evidence to support this contention. Instead, counsel restates the previous description provided and asserts that the beneficiary is a manager of sales and other essential functions in a small office. Again the unsupported statements of counsel on appeal or in a motion and unsworn statements are not evidence and are not entitled to any evidentiary weight and *See INS v. Phinpathya*, 464 U.S. at 188-89 n.6; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 503. Counsel has not submitted evidence or argument sufficient to require the reopening of this matter. On this issue, the previous decision of the AAO is affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. The regulation at 8 C.F.R. § 103.5(a)(4) states that: "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.