

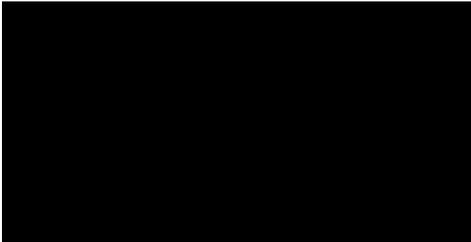
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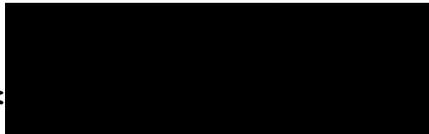
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FILE: SRC 03 173 00176 Office: TEXAS SERVICE CENTER Date: JUN 09 2005

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:

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

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

According to the documentary evidence contained in the record, the petitioner was incorporated in May of 2002 and claims to be a manufacturer and seller of specialist furniture. The petitioner claims to be a subsidiary of [REDACTED], located in London, UK. The petitioner seeks to employ the beneficiary temporarily in the United States as manager of its new office for a period of three years, at a yearly salary of \$100,000.00. The director determined that the petitioner had failed to submit sufficient evidence to establish that: (1) a qualifying relationship exists between the U.S. and foreign entities; and (2) the foreign entity has been doing business.

On appeal, the petitioner asserts that sufficient evidence has been submitted to establish the existence of a qualifying relationship between the U.S. and foreign entities, and that the foreign entity has been doing business.

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 (1)(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 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(1)(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 (1)(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.

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

Doing business means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

The petitioner claims to be a subsidiary of [REDACTED]. The petitioner claimed that [REDACTED] is 50 percent owned by [REDACTED] 25 percent owned by [REDACTED] and 25 percent by [REDACTED]. The petitioner also stated that the beneficiary is needed in the United States to manage its [REDACTED] project. The petitioner submitted copies of the U.S. entity's certificate of formation, organizational chart, business plan for [REDACTED] financial statements covering a period of July 1, 2002, [REDACTED] two stock certificates, and an operating agreement.

The director determined that insufficient evidence had been submitted, and subsequently made a request for evidence, specifically stating in part:

Please submit evidence of the ownership of [REDACTED]. Please submit copies of stock certificates, stock ledgers or other documentary evidence that clearly shows ownership and the percent owned by each entity.

U.S. Company

...

Please submit a copy of the business license and occupancy permit.

Please submit a copy of the corporate tax return for 2002.

Please submit evidence of the funding or capitalization of the U.S. company. Submit copies of wire transfers, canceled checks deposited to the corporate account or a letter signed by a bank officer stating the amount and source of the funding. Other documentary evidence may also be submitted.

Foreign Company

...

Please submit a copy of the current business license.

Please submit the corporate tax return for [REDACTED] for 2002.

Please submit evidence the company is conducting business for April, May and June 2003. Submit five documents for each month.

The stock distribution for the U.S. and foreign entities is as follows:

<u>U.S. ENTITY</u> - [REDACTED]		<u>FOREIGN ENTITY</u> - [REDACTED]	
<u>Shareholders</u>	<u>% of Shares</u>	<u>Shareholders</u>	<u>% of Shares</u>
[REDACTED]	50%	[REDACTED]	52%
[REDACTED]	25%	[REDACTED]	12%
[REDACTED]	25%	[REDACTED]	12%
		[REDACTED]	12%
		[REDACTED]	12%

In response to the director's request for additional evidence, the petitioner resubmitted a copy of the U.S. entity's Certification of Formation and financial statement covering the period from July 1, 2002, through December 31, 2002. The petitioner also submitted copies of the foreign entity's company registration, stock certificates number two through six, IRS Form I-9, Employment Eligibility Verifications, invoices, purchase orders, utility bills, and bank statements covering the period of April, May, and June of 2003.

The director denied the petition determining that the petitioner had failed to submit sufficient evidence to establish the existence of a subsidiary relationship between the U.S. and foreign entities. The director stated that the petitioner had failed to show that the foreign company owns more than half of the U.S. entity or that the foreign company has control over the U.S. entity.

On appeal, the petitioner's representative disagrees with the director's decision and asserts that the foreign entity has effective and overall control of the U.S. entity. The petitioner submits a Participation and Proxy

Agreement, a letter of confirmation from [REDACTED], a group organizational chart, and an affidavit of support.

The petitioner's representative's assertions are not persuasive. The purpose of the L-1 visa category is to facilitate key personnel between companies in the United States and their associated firms abroad. All L-1 Intracompany Transferee petitioners must initially establish that a qualifying relationship exists between the U.S. and foreign entities. See Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l)(1)(ii); 8 C.F.R. § 214.2(l)(3)(i); and 8 C.F.R. § 214.2(l)(1)(ii)(G).

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*.

Evidence of record fails to demonstrate that the U.S. entity owns, directly or indirectly, more than half of the foreign entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity. In this matter, the petitioner submitted as evidence of stock ownership stock certificate number three, dated October 1, 2002, which stated that [REDACTED] owned 25 percent of the U.S. entity's stock. 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., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Although the petitioner had an opportunity to submit evidence of management and control over the U.S. entity prior to the director's denial, it elected not to do so. On appeal the petitioner submitted a Participation and Proxy Agreement, which does not name the petitioner, is undated, and does not give [REDACTED] ownership and control of the petitioner. The proxy agreement is for the formation of a U.S. based company known as [REDACTED], not [REDACTED]. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion may deem necessary. 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). 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).

Where, as here, 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); *see also 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.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. 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). 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).

Even if the AAO were to consider the proxy agreement submitted on appeal, there has been no evidence presented in the record that demonstrates management and control over the U.S. entity by the foreign entity sufficient to establish a qualifying relationship. There is no evidence to show who or what [REDACTED] is and to what extent it granted [REDACTED] control over its voting shares. In order to establish "de facto" control of both entities by an individual, the petitioner must provide agreements relating to the control of a majority of the shares' voting rights through proxy agreements. *Matter of Hughes, supra*. A proxy agreement is a legal contract that allows one individual to act as a substitute and vote the shares of another shareholder. *See Black's Law Dictionary* 1241 (7th Ed. 1999).

The business documents presented by the petitioner to qualify the U.S. entity's operations are insufficient to establish that the foreign entity maintains management, ownership, or control over it. For example, neither the company's Certification of Incorporation, tax documents, payroll records, financial statements, bank statements or other company business documents demonstrate management and control over the U.S. entity by the foreign company. The petitioner has failed to produce meeting minutes or a stock certificate demonstrating that [REDACTED] owns any shares of stock in the U.S. entity. Documents submitted to reflect the business status of the U.S. entity do not reflect management and control by the foreign entity or a legal representative.

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. The record demonstrates that three individuals own unequal shares of stock in the U.S. entity, and that six individuals own unequal shares of stock in the foreign entity. In order to qualify as an affiliate, there must be a showing of commonality in the ownership and control of the U.S. and foreign entities. In the instant matter, no voting proxies or other agreements had been made a part of the record demonstrating that [REDACTED] who has majority ownership and control of the foreign entity, had any ownership or control of the petitioning entity when the petition was filed.

Upon review of the entire record, 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.

The second issue in this proceeding is whether the petitioner has submitted sufficient evidence to show that the foreign entity is doing business.

The director determined that insufficient evidence had been submitted to establish that the foreign entity was doing business. She subsequently requested that the petitioner submit a current business license, the

corporate tax return for [REDACTED] for 2002, and evidence that the foreign company is conducting business for April, May, and June of 2003.

In response to the director's request for evidence on this subject, the petitioner submitted copies of five invoices for goods purchased, several copies of invoices that were not legible, and a financial statement.

The director denied the petition after determining that the invoices submitted were not legible and that there had been no corporate tax records submitted. The director also concluded the invoices for purchases did not clearly support a finding that the foreign entity was continuously and systematically engaged in business at the time the petition was filed.

On appeal, the petitioner's representative disagrees with the director's decision and asserts that the foreign entity is continually and systematically engaged in the provision of goods and services. The petitioner's representative concludes by stating: "[w]e understand that invoices alone do not demonstrate the foreign company is continuously and systematically engaged in business at the time the petition was filed. Therefore, we are submitting copies of purchase orders and credit notes, as evidence to support this." As evidence on appeal, the petitioner submitted copies of the foreign entity's corporate tax return for 2002, original invoices, and copies of purchase orders and credit notes.

On reviewing the petition and the evidence, the petitioner has established that the foreign entity is engaged in the regular, systematic or continuous provision of goods and/or services. Therefore, the director's decision with respect to the issue of the foreign entity doing business will be withdrawn.

Although not explicitly addressed in the decision, the record contains insufficient documentation to persuade the AAO that the beneficiary has been and will be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). The petitioner described the beneficiary's past duties as "manager, shareholder oversee and manage operations in the UK, overall responsibility for business development and marketing." In response to the director's request for evidence on this subject, the petitioner described the beneficiary's proposed duties as being responsible for devising strategies and formulating policies, management of the [REDACTED] project, decision making, the implementation of a business plan, and building potential client relationships. The descriptions are too vague to establish that the beneficiary has been and will be employed primarily in a managerial or executive capacity. There has been insufficient evidence submitted to demonstrate that the beneficiary has been or will be relieved from performing non-qualifying duties by managerial, professional, or supervisory personnel. There is nothing in the record to demonstrate that the beneficiary has been or will be responsible for managing or directing the organization, a function, or division of the U.S. or foreign entity. Furthermore, there has been insufficient evidence submitted to demonstrate that the U.S. entity would be able to support a managerial or executive position within one year of operation. For these additional reasons, the petition may not be approved.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. See 8 C.F.R. § 214.2(1)(3)(v)(A). In response to the director's request for evidence on this subject, the petitioner submitted a copy of a lease agreement entered into by [REDACTED]. There has been no evidence submitted to demonstrate that the U.S. entity, [REDACTED] has entered into any form of commercial lease agreement to house its office. In addition, the petitioner has not described its anticipated space or size requirements. Based on the insufficiency of the evidence, it cannot be concluded that the petitioner has secured sufficient space to house the U.S. entity. For this additional reason, the petition may not be approved.

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In visa petition proceedings, the burden of proving eligibility for the benefit sought rests solely 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.