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File: WAC-03-231-50538 Office: CALIFORNIA SERVICE CENTER Date: JUN 15 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)

IN 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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the petition to the director for entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its President as an L-1A 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 is a corporation organized in the State of California that operates as an importer and marketer of fish. The petitioner claims that it is the subsidiary of Interrybflot, LLC, located in Russia. The beneficiary was initially approved for L-1 status in the United States, and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel notes that the AAO previously sustained an appeal from the director's denial of a Form I-140 immigrant petition filed by the petitioner on behalf of the beneficiary. Counsel asserts that the facts and evidence in the present matter are the same, and thus the director's denial of the present petition contradicts the AAO's prior decision. In support of this assertion, counsel submits a brief and a copy of the AAO's prior decision.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 issue in the present matter is whether the beneficiary will be employed by the petitioner in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In a letter submitted with the initial petition on August 7, 2003, the petitioner indicated that "[the beneficiary's] continuing presence is essential to stay competitive in current economic conditions, as well as to bring the business effort to completion."

On October 17, 2003, the director requested additional evidence, in part including evidence regarding the beneficiary's employment capacity and subordinates in the United States and abroad. In a response dated January 8, 2004, the petitioner provided the requested documentation regarding the beneficiary, including a letter that discusses the beneficiary's duties and role with the petitioner and foreign entity. The petitioner further submitted a breakdown of the beneficiary's tasks in the United States, including the percentage of time he devotes to his respective duties.

On February 4, 2004, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The director stated that "it appears that the beneficiary has been and/or will be performing many aspects of the day-to-day operations of [the petitioner.]" The director further found that "[t]here is insufficient detail regarding the actual duties to be performed by the beneficiary, and the realistic percentage of time devoted to these duties." The director determined that the beneficiary's duties would be largely non-qualifying sales and market research tasks. The director finally noted that the evidence of record does not

support that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties.

Upon review, the petitioner has shown that the beneficiary will be employed in a primarily managerial and executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In the instant matter, the evidence of record reflects that the beneficiary serves as the President of both the foreign entity and the petitioner. The petitioner submitted documentation to show that the foreign entity is a large-scale fishing company, operating four factory long-liners and one crab boat, with distribution primarily in Korea and the United States. The petitioner explained that it is in the process of eliminating intermediary distributors so that it can sell its products directly to end clients, and thus the beneficiary frequently travels to the United States from Russia to establish and manage these relationships. The petitioner provided an organizational chart that reflects that the foreign entity has numerous layers of management, with the beneficiary serving as the president with managerial authority over the entire staff. The petitioner provided an organizational chart for its operations, reflecting that the beneficiary manages two subordinate employees in the United States, a Managing Director and an Assistant Manager, as well as three independent distributors in Washington, Oregon, and Florida. The evidence of record supports that the beneficiary's subordinates include managerial and supervisory employees. *See* section 101(a)(44)(A)(ii) of the Act. The petitioner submitted a breakdown of the beneficiary's duties, including the percentage of time he devotes to his respective tasks which reflects that the majority of his time is devoted to managerial and executive duties. *See* sections 101(a)(44)(A) and (B) of the Act.

Based on the foregoing, the petitioner has shown that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3). The director's decision on this issue will be withdrawn.

Beyond the decision of the director, the record as presently constituted does not establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. On Form I-129, the petitioner indicates that it is the subsidiary of the beneficiary's foreign employer. However, the petitioner's supporting documentation provides that the beneficiary owns 100 percent of the stock of both the petitioner and the foreign entity. Thus, if this ownership is established, the two entities are affiliates due to being "owned and controlled by the same . . . individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(I).

The petitioner failed to submit adequate evidence with the initial petition to show the ownership of it and the foreign entity. The director requested further evidence of the claimed qualifying relationship, including: (1) the foreign entity's annual report that lists all affiliates, subsidiaries, and branch offices, and the percentage of ownership; (2) the foreign entity's articles of incorporation; (3) the foreign entity's sole proprietorship registration documents which clearly indicate the ownership of the company; (4) minutes of the petitioner's meetings that list the stock shareholders and the number and percentages of shares owned; (5) the petitioner's articles of incorporation; (6) the petitioner's sole proprietorship registration documents which clearly indicate the ownership of the company; and (7) evidence that the petitioner has been authorized to operate as a branch office in the State. In response, the petitioner provided: (1) the foreign entity's charter; (2) the petitioner's articles of incorporation; and (3) the petitioner's 2002 IRS Form 1120, U.S. Corporate Income Tax Return.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *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); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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*, 19 I&N Dec. 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.*, *supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner provided sufficient evidence to show that the foreign entity is owned by the beneficiary. Yet, the petitioner failed to fully respond to the director's request for evidence of its ownership, and the evidence of record is not adequate to show that the beneficiary is the sole shareholder. While the petitioner's articles of incorporation provide that it is authorized to issue one million shares of stock, it failed to provide documentation of how many shares have been issued and who owns the shares. The single document that states who owns the petitioner's stock is its 2002 IRS Form 1120, which provides that the beneficiary owned 100 percent of the petitioner's shares during the covered period. Yet, this document fails to account for the petitioner's stock ownership during the eight months prior to filing the petition. By itself, it is insufficient to show the ownership of the petitioner as of the date of filing.

As the director did not discuss this issue in his final decision, the petitioner shall be given an opportunity on remand to submit definitive evidence that it has a qualifying relationship with the foreign entity. Such evidence should include copies of stock certificates, the petitioner's stock ledger, evidence of payment made in exchange for the petitioner's stock, and any other documents the director deems necessary to establish eligibility for the benefit sought.

Counsel notes that the AAO previously sustained an appeal from the director's denial of a Form I-140 immigrant petition filed by the petitioner on behalf of the beneficiary. Counsel asserts that the facts and evidence in the present matter are the same. However, the present proceeding is a separate matter from the petitioner's Form I-140 immigrant petition. Evidence submitted with the petitioner's immigrant petition does not serve as evidence in the present proceeding. The petitioner must meet its burden by entering required evidence into the current record. The evidence in the current record of proceeding is insufficient to establish that the petitioner has a qualifying relationship with the foreign entity.

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. In this matter, the petitioner has overcome the specific objection of the director. However, an additional ground for ineligibility exists, and additional evidence is required in order to establish eligibility for the benefit sought. The director is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated February 4, 2004 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.