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U.S. Citizenship
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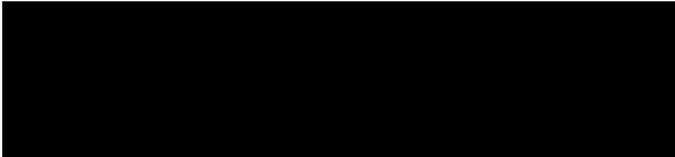
FILE: WAC 03 018 50806 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2005

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:



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, 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 dismiss the appeal.

The petitioner, a limited liability company organized in the State of California, is a new office engaging in the business of trade, food service, construction and demolition.¹ The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as director of U.S. operations in the capacity of 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 petition indicates that the petitioner is an affiliate of ██████████ located in Kecskemet, Hungary. The director denied the petition concluding the petitioner had failed to demonstrate the existence of a qualifying relationship between the foreign and U.S. entities.

On appeal, counsel contends that the decision of the Citizenship and Immigration Services (CIS) is incorrect because the CIS did not understand the business structure and ownership of the two entities. Counsel asserts that the two entities have a qualifying relationship both as affiliates and as a parent and a subsidiary. Counsel submits additional documentation in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. 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 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 (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.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within 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 services in the United

¹ It should be noted that according to California State corporate records, the petitioner has completed the "winding up" of its affairs and has submitted a Certificate of Cancellation to the Secretary of State. Although it appears a Certificate of Cancellation has not yet been issued, it raises the question of the company's continued existence and its right to do business as a legal entity in the United States.

States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether a qualifying relationship exists between the beneficiary's foreign employer and the U.S. organization.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(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 operating 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.

On the L Supplement to Form I-129, Petition for a Nonimmigrant Worker, and in a letter dated October 1, 2002, the petitioner stated that the U.S. and foreign organizations are affiliates "because the two companies are majority owned by the same individuals." Along with the initial petition, the petitioner submitted copies of several amendments to the foreign entity's articles of organization. The latest version of that document, dated July 15, 2002, states that [REDACTED] are controlling members of the entity; there is no information as to the respective percentages of ownership or membership interest of those individuals. The petitioner provided a copy of the U.S. entity's articles of organization and fictitious business name statement but did not submit any documentation relating to the ownership or control of the U.S. entity.

In a request for evidence dated February 4, 2003, the director asked that the petitioner submit the following evidence to establish a qualifying relationship between the U.S. and foreign entities: (1) annual reports of the foreign entity; (2) minutes of meetings for the foreign entity setting forth the company's shareholders and the percentage of shares owned, evidencing any discussion to form the U.S. entity and reflecting all shareholders of the foreign entity; (3) any feasibility study and business plan prepared for the U.S. entity; (4) proof of stock purchase to show that the foreign entity has in fact paid for the U.S. entity, including copies of the original wire transfers; (5) minutes of meetings for the U.S. entity setting forth the company's shareholders and the percentage of shares owned; and (6) stock certificates of the U.S. entity issued to date.

In a letter responding to the request for evidence, counsel stated that because the foreign entity is a limited liability company rather than a public corporation, there are no annual reports or minutes of meetings regarding stock ownership. Counsel resubmitted the foreign entity's company brochure, 2000 and 2001 annual accounting reports, and articles of organization that were provided with the original petition. Counsel also indicated that there were no minutes of meetings for the foreign entity, or feasibility study, relating to the formation of the U.S. entity, and submitted instead a business plan/executive summary for the U.S. company prepared by the managing members of the foreign entity. With respect to the foreign entity's investment in the U.S. entity, counsel stated that the beneficiary had entered the U.S. with \$35,000 in cash intended as start-up fund for the U.S. entity, and that the foreign entity has provided further capitalization in the amount of \$29,761. Counsel included bank statements purportedly evidencing the wire transfers of such funds. With respect to ownership of the U.S. entity, counsel stated that as it is a limited liability company, there are no minutes of meetings and no stock certificates for the company. Counsel instead submitted a limited liability company statement of information and membership certificates for the company.

In a decision dated June 12, 2003, the director denied the petition. The director noted that the petitioner failed to provide sufficient evidence relating to the transfer of funds to the U.S. entity, and there is no evidence of percentage of ownership. The director acknowledged that the record contains copies of "stock certificates," but noted that absent other verifiable documentation, stock certificates alone are insufficient proof of ownership and control. Therefore, the director found that the record does not show that the petitioner is a subsidiary or affiliate of the beneficiary's foreign employer and concluded that the petitioner has failed to establish a qualifying relationship between the U.S. and foreign entities.

On appeal, counsel asserts that an affiliate relationship also exists between the two entities because both entities are owned and controlled by the same two individuals. At the same time, counsel asserts that the two entities have a qualifying relationship as a parent and subsidiary because the foreign entity directly owns and controls the U.S. entity. Counsel contends that the director's decision is based on a failure to understand the

business structure and ownership of the two entities. Counsel asserts that the director requested documentation that would be applicable to large or publicly traded corporations rather than closely-held limited liability companies, and improperly based his decision on the petitioner's inability to produce documents that did not exist. Counsel also claims that the director's reasoning shows that he only partially reviewed the petitioner's documentation and based his decision on "additional" evidence such as the wire transfers rather than "direct and primary" evidence concerning the ownership and control of the entities.

The AAO agrees with the director's conclusion that the petitioner did not provide sufficient evidence regarding the ownership and control of the foreign and U.S. entities, and therefore failed to establish that a qualifying relationship exists between the two entities.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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.

On appeal, counsel claims that the foreign and U.S. entities "are affiliates because each of the legal entities are owned and controlled by the same two individuals, each owning and controlling approximately the same share or proportion of each entity, in this case 50.00000% each." The AAO finds that the evidence of record is insufficient to support the petitioner and counsel's claims with respect to the ownership and control of the foreign entity. The petitioner submitted only two documents relevant to the issue of ownership and control of the foreign entity: (1) a document entitled "Amended Articles/Registered Amendments," dated February 15, 2001, which references the original operating agreement of the company and amends certain information in that agreement, and (2) a document entitled "Articles of Organization" which sets forth the operative data for the company as of July 15, 2002.² With respect to the members of the company, the February 15, 2001 amendments indicate that as of June 10, 2000, a member named [REDACTED] was deleted, and [REDACTED] listed as a 50% controlling member. The July 15, 2002 document lists [REDACTED] as "controlling member[s]," but does not indicate the percentage of membership interest held by either individual. As such, these documents alone do not conclusively support counsel's claim that [REDACTED] and [REDACTED] each possess a 50% interest in the foreign entity. The petitioner did not submit the foreign entity's complete operating agreement or any similar document that might confirm the members' respective membership interests in the company, or set forth any agreement between the members relating to the voting of membership interest, the distribution of profit, the management and direction of the company, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents,

² The AAO notes that based on the paragraph numbering in the Amended Articles, it appears that the document sets forth only data relating to the company that needed to be updated, and not all of the data that would ordinarily appear in the formation or organizational documents of the company.

the AAO cannot conclude that the ownership and control of the foreign entity is as claimed by the petitioner and counsel.

Likewise, the petitioner has not provided sufficient information to establish clearly the ownership and control of the U.S. entity. In response to the director's request for further evidence, the petitioner submitted a limited liability company statement of information, filed with the Secretary of State of California on October 9, 2002, which names [REDACTED] as members or managers of the company, without indicating the percentages of their membership interests. The petitioner also submitted copies of two certificates of membership interest, dated August 7, 2002, which indicate that [REDACTED] each held 50% membership interest in the company.³ However, the certificates have not been executed and are therefore of little probative value. Further, the AAO notes that the petitioner has also failed to submit the U.S. company's operating agreement, or any similar document that might set forth any agreement between the members relating to the voting of membership interest, the distribution of profit, the management and direction of the company, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, the AAO cannot conclude that the ownership and control of the U.S. entity is as claimed by the petitioner and counsel.

In all, there is insufficient evidence to support the conclusion that the two entities in this matter are "owned and controlled by the same group of individuals, *each individual owning and controlling approximately the same share or proportion of each entity ...*" and are therefore affiliates, as counsel claimed. 8 C.F.R. § 214.2(l)(1)(ii)(L)(2) (*emphasis added*).

Furthermore, counsel's claim on appeal that the two entities "have a qualifying relationship as a parent and subsidiary because [the foreign entity] directly owns and control [the U.S. entity]" is incorrect and not supported by the evidence of record. The regulations defines a subsidiary as "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." 8 C.F.R. § 214.2(l)(1)(ii)(K). Here, the petitioner has provided no evidence that the foreign entity owns or controls any part of the U.S. entity, but instead has claimed, as discussed at length above, that the two entities are owned by two individuals. Common ownership of the two entities by the same individuals, if sufficiently documented, would establish an affiliate relationship between the two entities, not a parent-subsidiary relationship.

In light of the foregoing, the AAO concludes that the evidence of record is insufficient to establish that there exists a qualifying relationship between the foreign and U.S. entities.

Beyond the decision of the director, the evidence of record is insufficient to show that the petitioner has secured sufficient physical premises to house the new office, as required by the regulation at 8 C.F.R. §

³ At the outset, the AAO notes that the director stated that the record contains "stock certificates" of the U.S. company. As counsel pointed out on appeal, the documents to which the director referred are actually certificates of membership interest in a limited liability company. As such, the director's statement is technically incorrect and will be withdrawn.

214.2(l)(3)(v)(A), pertaining to petitions involving a new office. The petitioner submitted a lease with a term commencing on October 11, 2002 and ending on January 31, 2003, which lists as the tenant [REDACTED] and [REDACTED] jointly and severally, dba: [REDACTED]. While the two individuals named are the U.S. company's members, there is no indication on the face of the lease that the premises are to be used to house the new office of the U.S. entity, nor has the petitioner submitted any evidence to support a conclusion that such premises are "sufficient physical premises" for the new office. Moreover, the copy of the lease submitted has not been executed. Based on the insufficiency of the evidence furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.