



U.S. Citizenship
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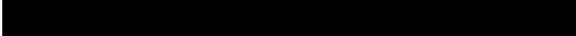
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File: WAC 03 231 50378 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2005**

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.


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 filed this nonimmigrant petition seeking to employ the beneficiary 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 publicly traded corporation organized in the State of Delaware that is engaged in gold, zirconium and rare earth exploration and mining development. The petitioner claims that it is the parent company of the beneficiary's current employer, located in Toronto, Canada. The petitioner now seeks to employ the beneficiary as its president for a one-year period.

The director denied the petition concluding that the petitioner did not establish that it was a qualifying organization doing business in the United States pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(H).

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 for the petitioner asserts that the director overlooked evidence that demonstrates that the petitioner is in fact doing business. Further, counsel contends that the director erroneously based his conclusion solely on two factors which should not have been determinative, namely, the petitioner's failure to file U.S. income tax returns for the previous three years and a discrepancy with respect to its IRS employer tax identification number. In support of the appeal, counsel submits a brief and additional evidence.

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

The primary issue in the present matter is whether the petitioner is a qualifying organization doing business in the United States.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G), a 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.

Further, 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as 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.

With the initial petition submitted on August 8, 2003, the petitioner submitted a business plan describing the company's current operations and prospective activities, and a copy of its Form 10-QSB, Quarterly Report Under Section 13 or 15(d) of the Securities Exchange Act of 1934 for the quarter ended March 31, 2003, filed with the U.S. Securities and Exchange Commission (SEC). The company's business plan reveals that the petitioner owns nine mining concessions, with full mining rights on an additional ten mining concessions, all located in central Peru, and that the company was formed to develop these interests. The business plan reveals that the company has been studying and drilling the property, built a 25-acre base camp, imported various pieces of mining and processing equipment, and raised money for these activities. The business plan suggests that commercial production of the mines would not begin prior to the second or third quarter of fiscal year 2004, pending successful drilling results and proper funding. The petitioner's Form 10-QSB shows total assets of \$1,985,866, and states "the Company has never had any revenues from any of its mining projects. The Company will only be able to generate revenues when the Company begins commercial production of the mines. If and when the Company will begin commercial production is uncertain." The Form 10-QSB also states that the company completed its "phase 1" drilling program in Peru in November 2002, but that operations at the Peruvian mine had temporarily ceased, possibly to be re-started in August 2003.

On August 15, 2003, the director requested additional evidence. Specifically, the director asked that the petitioner provide signed copies of its Federal Income Taxes for the year 2002; a detailed organizational chart for the U.S. business; state quarterly wage reports for the last four quarters; federal Forms 941, Quarterly Wage Reports for all employees for the last four quarters; and copies of its payroll summary, W-2s and W-3s evidencing wages paid to employees. The director also noted that the IRS tax identification number indicated on the Form I-129 Petition did not match the number on the submitted Form W-2 and requested that the petitioner clarify this issue.

In a response received on November 12, 2003, the petitioner stated that it typically employs six employees in the United States and provided an organizational chart for the U.S. entity showing that the beneficiary would directly supervise a general counsel, chief engineer, executive vice president of marketing, and an assistant to the general counsel, with additional staff in Peru, including two camp managers and twenty workers. The petitioner provided copies of its Forms W-2 and W-3 for 2002 and its federal and state quarterly tax returns for the requested period. The petitioner also submitted an amended Form I-129 with a revised IRS employer identification number that matches the number reflected on all of the tax documentation, but did not provide an explanation for the discrepancy. Finally, the petitioner stated that its tax accountant had not filed an income tax return for the fiscal years 2000, 2001 and 2002 but that the company anticipated preparing and filing all three returns by the end of 2003. The petitioner submitted a copy of Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return showing that the petitioner requested an extension until September 15, 2003 to file its 2002 corporate tax return.

On November 25, 2003, the director denied the petition concluding that the petitioner had not established that it was doing business in the United States. The director noted that its failure to provide its federal tax returns for the last three years "raises serious doubt as to the validity of its claim to be a legitimate business entity and its employment offer as an employer." The director also stated that public records could validate neither of the employer tax identification numbers provided by the petitioner.

On appeal, counsel for the petitioner disputes the director's finding that the petitioner has not been doing business and asserts that the director's bases for such finding were erroneous. Counsel further contends that the director overlooked evidence that the petitioner is clearly operating as a mining company, and also asserts that it is normal in the industry for a company to require three to five years for its mining operations to become viable. Counsel asserts that the failure to generate income or revenue for the first three years of operation has led the petitioner to overlook filing its tax returns, but that this failure was due to a misconception of the law. In addition, counsel contends that the record contains sufficient evidence, including SEC filings, quarterly income tax returns and quarterly reports, demonstrating that the petitioner is a legitimate mining company engaged in actual exploration and drilling programs, and that the petitioner's shareholders are committed to continued investments in the company. With respect to the discrepancy in the company's reported Employer Identifying Numbers (EINs), counsel notes that the confusion was created by the 2002 merger of two companies, Vista Continental Corporation, a Nevada Corporation, with Century Laboratories, a Delaware Corporation with a separate EIN. Counsel asserts that, as a result of the transaction, Century Laboratories, Inc. assumed and maintained the Vista Continental Corporation name, but both company's EINs still exist and are valid.

Upon review of the petition and the evidence, the AAO concurs with the director's determination that the petitioner has not established that it is doing business as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H). While the director based his decision primarily on the petitioner's failure to file tax returns for the three years prior to submitting the instant petition and inconsistencies with respect to the petitioner's IRS employer identification number, there is additional evidence in the record which also suggests that the company is not engaged in the regular, systematic and continuous provision of goods and services and/or is therefore not "doing business" for immigration purposes.

As noted above, the director specifically requested that the petitioner provide a copy of its 2002 U.S. Corporation Income Tax Return. The petitioner replied that its accountant had not filed income tax returns for fiscal years 2000, 2001 and 2002, but stated that it would file all tax returns for all three years by the end of 2003. It also submitted a copy of its request for an extension until September 15, 2003 to file its 2002 income tax return. The petitioner offered no explanation as to why the company, which claims to have employees and to be actively conducting business, failed to file the previous returns in the course of doing business. In addition, the petitioner responded to the request for evidence in November 2003, by which date it should have filed its 2002 income tax return, assuming it was granted an extension until September 15, 2003. The petitioner's failure to submit these documents or, alternatively, to provide an adequate explanation regarding the non-existence or other unavailability of requested evidence in response to the director's request creates a presumption of ineligibility. *See* 8 C.F.R. § 103.2(b)(2)(i).

On appeal, counsel explains that the company simply overlooked filing its tax returns due to a misconception of the law, suggesting the company's tax accountant believed that it was not necessary to file the returns because the company had no income. However, if counsel had wanted CIS to take its explanation into consideration, it should have offered this information in response to the director's request for evidence. Counsel is correct that the regulations governing intracompany transferees do not require submission of income tax returns to establish eligibility. Counsel does not consider, however, that the regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the director may request additional evidence in appropriate cases. The director's request for the company's tax returns was reasonable under the circumstances, and the petitioner's failure to submit the requested documents or an adequate explanation in response to the request cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits an explanation on appeal. However, the AAO will not consider this information for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Counsel also asserts that its regular filings with the SEC provide sufficient evidence that the company is actively doing business. There are two problems with this argument. First, the SEC filings all show a different employer identification number than that reflected on all of the submitted tax documents and on the corrected Form I-129. If the SEC filings are not for the petitioning company, it is not clear how they establish that the petitioner is doing business. Second, the documents filed with the SEC suggest that the company placed its exploratory mining activities in Peru on hold in November 2002 and had not restarted them as of January 2004. The AAO recognizes that a newly formed mining company may require several years to reach the profitable production phase. However, this particular operation seems to have indefinitely stalled in the

exploratory stage and it is not clear that it has engaged in any regular, continuous or systematic activity since completing its "phase one" drilling in 2002.

Finally, the AAO concurs with the director that the inconsistencies in the petitioner's tax identification number have not been adequately explained or resolved. The petitioner utilized the number "72-0510027" on the initial I-129 Petition and this number is reflected on all submitted copies of SEC filings. All of the petitioner's tax documentation, including its 2002 Forms W-2 and 941, show "51-0393384" and a different company name "Vista Continental Development." The petitioner also submitted a certificate of name change for Vista Continental Corporation dated December 16, 1999, showing its previous name as "Vista Continental Development Corporation," but did not explain why this previous company name appears on tax documents issued in 2002. In response to the director's request for clarification regarding the tax number, counsel for the petitioner merely stated that [REDACTED] is the correct number and submitted a modified Form I-129. No further explanation was provided, and counsel did not indicate that the number utilized on the SEC filings was incorrect, which leads to a conclusion that the petitioner is not the same company whose activities are reflected in the SEC documents.

On appeal, counsel explains that the confusion was created by the merger of Vista Continental Corporation, a Nevada corporation assigned tax identification number [REDACTED] with the company formerly known as Century Laboratories, Inc., a Delaware corporation assigned tax identification number [REDACTED] which is now known as Vista Continental Corporation. While the AAO acknowledges counsel's argument that the petitioner has utilized both numbers in good faith in its filings with the IRS and SEC, the petitioner still has not resolved which "Vista Continental Corporation" actually serves as the petitioner in this case, or explained why it appears to use one identification number for IRS filings and a different number for SEC filings. In addition, there is also a question as to whether the merger between the two companies actually occurred. The Form 10-KSB Annual Report for the year ended on September 30, 2003, submitted on appeal, reveals that the Reorganization and Stock Purchase Agreement between Century Laboratories, Inc. and Vista Continental Corporation for the purpose of acquiring 100% of the issued and outstanding shares of Vista Continental Corporation was never fully consummated. This information raises further questions about the company's apparent interchangeable use of tax identification numbers. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence point to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Notwithstanding the issue raised by the director as to whether either or both tax identification numbers are valid, the AAO cannot determine which company actually serves as the petitioner in this case.

Based on the many unresolved inconsistencies in the record, the AAO cannot conclude that the petitioner has been engaged in the regular, systematic and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H). As the petitioner has not established that it is a qualifying organization doing business in the United States, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary had been employed by a qualifying organization on a full time basis for at least one continuous year within the three years prior to filing the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii). The petitioner submitted a stock certificate for the

Canadian company, which was incorporated in 2001 and is apparently owned by Vista Development Corporation, the Nevada company. However, if the petitioner, the Delaware company, never completed its acquisition of the Nevada company, the Nevada company's claimed Canadian subsidiary would not have a qualifying relationship with the petitioner. Moreover, even if there is a relationship between the petitioner and the beneficiary's claimed Canadian employer, the petitioner submitted no evidence to establish that the Canadian company was doing business or to establish that the beneficiary actually worked for the company, other than a letter from the petitioner's current president which states that the beneficiary served as president of the Canadian company for two years. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190. (Reg. Comm. 1972)). In addition, the petitioner claims that the beneficiary was working for the U.S. company as a consultant since 2000 and submitted copies of a Form 1099 and a Form W-2 issued by the petitioner to the beneficiary in 2002, with payments totaling \$97,799. The petitioner's 2003 Form 10-KSB also states that the beneficiary served as the U.S. company's president from November 2001 to December 2002, and reports that he received compensation of \$97,799. Based on this conflicting evidence, petitioner's claim that the beneficiary has completed the requisite one year of full time employment with a qualifying organization in Canada is not credible. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. See, e.g., *Anetekai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). For this additional reason, the petition cannot 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).

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.

ORDER: The appeal is dismissed.