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D-7

File: EAC 03 150 52138 Office: VERMONT SERVICE CENTER Date: **APR 03 2006**

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, Vermont 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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a limited liability company organized in the State of Maryland that is described as a cleaning service, **seeks to employ the beneficiary as its chief executive officer**. The petitioner claims that it is the subsidiary of [REDACTED] located in Maracaibo, Venezuela. The petitioner seeks to employ the beneficiary in the United States to open a new office.¹

The director denied the petition, determining that the petitioner had failed to establish that (1) the petitioner and the organization which employed the beneficiary abroad were qualifying organizations; or (2) the beneficiary would be employed in a managerial or executive capacity in the United States within one year of the petition's approval.

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, counsel² for the petitioner submits a brief which seeks to clarify the petitioner's relationship with the foreign entity and the beneficiary's position while employed abroad.

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.

¹ The AAO notes that on Form I-129, the petitioner claimed that it was *not* a new office. However, absent evidence that the petitioner had been doing business for the year prior to the petition's filing, the director determined that the petitioner met the definition of a "new office" as defined by 8 C.F.R. § 214.2(l)(1)(ii)(F) and proceeded to adjudicate the petition on this basis.

² Although the petitioner named on the Form I-129 is the foreign entity, it appears that this was an inadvertent error by the actual petitioner, the U.S. entity. Therefore, counsel's representation on appeal on behalf of the U.S. entity will be accepted as properly entered.

- (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.
- (v) 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 (l)(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 primary issue in the present matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (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, or
 - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the Venezuelan entity is the parent of the U.S. entity. Specifically, the petitioner asserts that the Venezuelan entity owns a fifty percent interest in the U.S. entity through a fifty-fifty joint venture, and that this interest thereby satisfies the parent-subsidary definition.

Upon review of the evidence submitted, the director concluded that the foreign entity did not own a majority interest in the U.S. entity as required by the regulations, and thus a parent-subsidary relationship was not established. The director further noted that corporate documentation in the record was conflicting, thus prohibiting a finding that a qualifying relationship existed. As a result, the petition was denied on October 15, 2003.

The petitioner appealed the decision, asserting that the director's decision ignored the clear evidence of the foreign entity's ownership interests in the petitioner. Specifically, counsel asserts that by way of the foreign entity's ownership of fifty percent of the petitioner by way of a joint venture, the petitioner's relationship with the foreign entity meets the definition of parent-subsidary. In support of this contention, counsel for the petitioner provides a detailed discussion of the ownership interests of both the U.S. and foreign entities.

Upon review, the petitioner has not established that the U.S. and foreign entities are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

Specifically, the statute requires that the beneficiary come to the United States to "render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." Section 203(b)(1)(C) of the Act. Critical to its claimed eligibility, the petitioner asserts that the U.S. company is the subsidiary of [REDACTED] based on the ownership interest of the foreign entity.

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*, 19 I&N Dec. at 595.

Furthermore, the critical regulations at 8 C.F.R. §§ 214.2(l)(1)(ii)(I) and (K) state in pertinent part:

- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (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.

The operating agreement submitted in support of the petition and executed on January 27, 2003 clearly indicates that the membership interests in the petitioner's limited liability company are divided equally between the beneficiary (50%) and the foreign entity (50%). However, the Articles of Organization, also executed on January 27, 2003, clearly indicate that the initial ownership interests in the petitioner will be delegated in total (100%) to the beneficiary. 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 pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director noted this discrepancy and consequently requested additional evidence to establish the true ownership of the petitioner in the request for evidence issued on May 23, 2003. The petitioner, however, failed to submit any additional evidence to clarify and corroborate the claimed ownership of the petitioner. Consequently, the director concluded that the record contained insufficient evidence of a qualifying relationship between the two entities and correctly denied the petition. 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).

On appeal, counsel alleges that the director erroneously relied on the Articles of Organization, and claims that the beneficiary is only listed in the Articles of Organization as the petitioner's resident agent.³ Since the Articles of Organization and Operating Agreement both set forth distinctly different ownership interests, and since both were executed on the same day, the AAO is unable to determine that the foreign entity does in fact have an interest in the petitioner. Absent additional evidence, such as dated share certificates or evidence that funds were transferred in exchange for membership interests, there is insufficient evidence to establish that a qualifying relationship exists between the entities.⁴ Furthermore, despite repeated claims of a joint venture agreement between the petitioner and the foreign entity, no documentation of such agreement was submitted. 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)). For this reason, the petition may not be approved.

³ Counsel, however, overlooks the area entitled "Definitions" at Section 3, Subsection "j," which states "'Company Percentage' refers to that percentage of the company owned by a Member and is used to compute allocations and distributions and [the beneficiary] shall initially own 100% of the Company."

⁴ Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the decision, the director correctly notes that in this case, it is possible that the foreign entity would have *de facto* control over the petitioner, since fifty percent ownership, as is alleged here, would be sufficient to prevent action by the petitioner through the exercise of the foreign entity's veto power. See *Matter of Siemens Medical Systems, Inc.*, 19 I & N Dec. 362 (BIA 1986). However, absent independent documentation to clarify the nature of the petitioner's ownership, the element of control is not applicable.

The second issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity within one year of the approval of the petition.

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 the initial petition, the petitioner submitted minimal documentation to supplement the statements provided on Form I-129. Specifically, the petition itself did not describe the beneficiary's proposed duties, and an accompanying letter from the petitioner, written entirely in Spanish, was not considered because it was not accompanied by a translation. *See* 8 C.F.R. § 103.2(b)(3).

Consequently, the director issued a request for additional evidence on May 23, 2003. The three-page request was extremely thorough and asked the petitioner to submit all of the evidence required under 8 C.F.R. §§ 214.2(l)(3)(i)-(v). The request specifically asked the petitioner to submit documentation outlining the capital investment made by the foreign entity for the U.S. entity, a copy of the petitioner's proposed organizational chart outlining the organizational hierarchy of the entity, and the business plans for the petitioner. In addition, a comprehensive discussion of the beneficiary's proposed duties was also requested.

In a response dated August 14, 2003, the petitioner's former counsel submitted extensive documentation in response to the director's request. In a letter of the same date written in her capacity as chief executive officer, the beneficiary claimed that she would be responsible for 100% of the day-to-day duties of the company. In addition, Section 10 of the petitioner's Operating Agreement, dated January 27, 2003, indicated that the beneficiary would assume sole responsibility for the company's accounting and bookkeeping services. Although a detailed description of her duties abroad was submitted, the petitioner failed to submit a description of the beneficiary's proposed duties in the United States during the first year of operations. In addition, despite the director's specific requests, the petitioner failed to submit a business plan or further evidence of the petitioner's business presence in the United States as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(1).

On October 15, 2003, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the petitioner would not reach the point where it could employ the beneficiary in a primarily managerial or executive capacity by the end of the first year of operations since it appeared that the beneficiary would merely be involved in training, cleaning, accounting, and all other necessary business functions.

On appeal, newly-appointed counsel for the petitioner restates the beneficiary's qualifications and claims once again that the director's decision was erroneous. Specifically, counsel relies on previous AAO decisions addressing the issue of company size in determining whether a beneficiary will be working in a managerial or executive capacity and alleges that the director erroneously used this factor as a basis for the denial. In addition, counsel alleges that the director's request for a business plan was erroneous as there is no legal precedent for such a request. The AAO disagrees with counsel's contentions.

Upon review, the petitioner's assertions are not persuasive.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it

moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's staffing requirements and contain a timetable for hiring, as well as a job description for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

On appeal, the AAO notes that the petitioner submits the requested business plan for the first time. The plan also outlines the duties of the beneficiary and other proposed employees. The petitioner, however, was put on notice of this 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 it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

In this matter, the director requested a comprehensive business plan from the petitioner, but the petitioner failed and/or refused to submit the requested documentation. Without a business plan and without evidence specifically detailing the beneficiary's duties, the director was unable to ascertain the duties of the beneficiary, the proposed staffing levels, or the goals and pursuits of the petitioner for the coming year. Again, 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).

The director, therefore, correctly denied the petition, for the record of proceeding is devoid of the evidence required under 8 C.F.R. § 214.2(l)(3). On appeal, counsel observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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.*

As discussed above, the petitioner failed to submit the requested evidence with regard to staffing and delegation of duties, thereby prohibiting the director from thoroughly reviewing the petitioner's structure and proposed expansion. On appeal, counsel asserts that the petitioner has an accountant to relieve the beneficiary from her booking duties and further alleges that the beneficiary does not do any of the cleaning services provided by the petitioner. However, the AAO is not convinced by counsel's contentions, particularly since the evidence in the record clearly contradicts these claims. 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. 503, 506 (BIA 1980).

As a result, counsel's assertions on appeal are simply insufficient to overcome the director's denial. The petitioner's failure to supplement the record with the requested evidence regarding the petitioner's business plan and the beneficiary's duties, despite ample opportunity and specific instructions as to what was required, precluded a material line of inquiry. Thus, the director's conclusions are logical and well-reasoned, and the AAO concurs with these findings. For this additional reason, the petition may not be approved.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.