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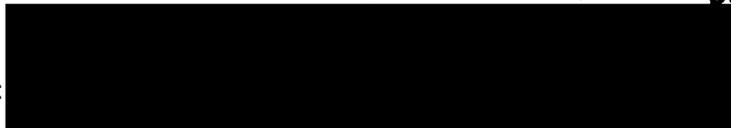
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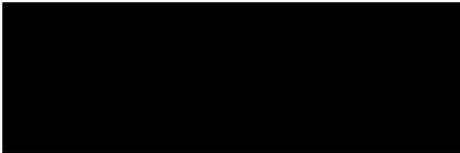
File: SRC 05 129 50826 Office: TEXAS SERVICE CENTER Date: DEC 06 2006

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)

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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, a Texas corporation, states that it is engaged in the acquisition, processing, marketing and distribution of seismic data. The petitioner claims that it is the parent company of the beneficiary's foreign employer, [REDACTED] located in Nigeria. The petitioner seeks to employ the beneficiary as its managing director for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the U.S. company is a qualifying organization as required by 8 C.F.R. § 214.2(l)(3)(i). Specifically, the director determined that the petitioner failed to demonstrate that the U.S. company is currently doing business.

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 disputes the director's findings and asserts that the U.S. company is actively doing business in the United States. Counsel emphasizes that the business "consists mostly in creating and maintaining business ties with U.S. customers and therefore it does not generate large numbers of invoices, purchase orders or other such documentation." Counsel submits a brief and new evidence in support of the appeal.

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 sole issue addressed in the director's decision is whether the petitioner has established that it is a qualifying organization doing business in the United States.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) 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 paragraphs (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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines the term "doing business" as:

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 nonimmigrant petition was filed on April 4, 2005. On the Form I-129 petition, the petitioner described its business as "acquisition, processing, marketing and distribution of seismic data." The petitioner indicated that it has four Texas-based employees and \$800,000 in gross annual income. The petitioner submitted a company overview that primarily outlines the company's activities in Africa. The company overview states that the U.S. petitioner has a staff of six personnel who "have developed solid working relationships between local reputable USA companies doing diverse business ventures with many African countries."

The director issued a request for evidence on April 9, 2005, and instructed the petitioner to submit: (1) the U.S. company's 2004 Form 1120, U.S. Corporation Income Tax Return; and (2) evidence such as invoices, bills of sale, or purchase orders to establish that the U.S. company has been doing business for the last year.

In a response dated July 5, 2005, the petitioner submitted its 2004 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, with Schedules K-1. The petitioner's tax return shows that the company had total assets of \$14,742, gross receipts or sales of \$101,427, and ordinary business income of \$14,642. The tax return shows no deductions for salaries, rents, taxes and licenses, interest, or advertising, and indicates "other deductions" of \$86,785. Many sections of the tax return were not completed.

In response to the director's request for documentary evidence related to the U.S. company's business transactions, the petitioner submitted: (1) a copy of a wire transfer request completed by the U.S. company on April 26, 2004 ordering the transfer of \$12,567.15 to the Nigerian entity, which is identified as "royalty payment to Ministry of Petroleum Resources, Joint Venture w/TAS NOPEC & TATNET NIG. LTD"; (2) a copy of a renewal application submitted by the petitioner's president for membership in the American Association of Petroleum Geologists, along with a company check in the amount of \$75, dated September 13, 2004; and (3) a receipt for the company's May 2005 rent payment.

The director denied the petition on July 21, 2005, concluding that the petitioner had not established that the U.S. company is a qualifying organization. Specifically, the director stated:

As stated on the original petition[,] the company was established in 1989. However no evidence was submitted to show that the petitioner was currently doing business. A copy of the petitioner's 2004 tax return was submitted but does not show that the petitioner was actually doing business. No other evidence was submitted to show that the petitioner is currently doing business.

The petitioner filed the instant appeal on August 15, 2005. On appeal, counsel for the petitioner contends that the U.S. company is actively doing business and notes that the petitioner submitted in response to the director's request evidence of a royalty payment "in connection with a joint venture," and "invoices showing oil and gas projects in Nigeria." Counsel further clarifies the nature of the petitioner's business activities as follows:

The U.S. petitioner's business consists mostly in creating and maintaining business ties with U.S. customers and therefore it does not generate large numbers of invoices, purchase orders or other such documentation. Typical of the petitioner's business activities is its arrangement for the beneficiary to attend the 2004 Offshore Technology Conference in Houston, Texas.... [T]he purpose was to meet "contractors in their own environment," meet "possible suppliers/clients," grow "new business relationships," visit with customer, potential customers and global decision makers," provide exposure for "company products, technology, and availability," etc. These activities describe the petitioner's business activities in the U.S.

In support of the appeal, the petitioner re-submits its 2004 federal tax return, along with the following documentation: (1) a registration form and information regarding the above-referenced technology conference, held in May 2004; (2) a company profile for a Nigerian company called [REDACTED] which lists the beneficiary and the petitioner's president as part of the management team; (3) three purchase orders for computer and networking equipment, dated in 2005; (4) the petitioner's bank statements for the period April 2004 through December 2004, with several months showing no deposits; (5) evidence related to the formation of a British Virgin Islands company, established in September 2004, which is partially owned by the petitioner and the beneficiary's foreign employer; (6) an international consultancy agreement between "TGS NOPEC Geophysical Company" and the petitioner dated March 7, 2000 under which the petitioner was to provide consulting services in exchange for monthly

commission payments; and (7) an agreement, dated December 19, 2001, between the Nigerian Ministry of Petroleum Resources and [REDACTED] Geophysical Company "in partnership with [REDACTED] wherein [REDACTED] is identified as the beneficiary's Nigerian employer.

Counsel asserts that the attached purchase orders show "extensive upgrades of computer equipment located in [the petitioner's] Houston Office." Counsel emphasizes that the U.S. entity is involved in several joint ventures, and notes that the above-referenced agreements remain in force. Counsel concludes that the petitioner submitted sufficient evidence to establish that the petitioner is a qualifying organization doing business in the United States.

Counsel's assertions are not persuasive. Upon review of the record, the petitioner has not established that the U.S. company is a qualifying organization doing business as defined at 8 C.F.R. § 214.2(l)(1)(ii)(H). Preliminarily, the AAO notes that the petitioner initially claimed on Form I-129 to have gross annual income of \$800,000, and subsequently submitted its Form 1120S showing approximately \$101,000 in gross receipts for 2004. The petitioner has neither explained this significant discrepancy, nor submitted any supporting evidence to substantiate the credibility of either figure. 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). 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. *Id.*

The director specifically requested documentary evidence in the form of invoices, purchase orders, and bills of sale to establish that the petitioner had been doing business in the United States for one year. In response, the petitioner submitted evidence that the company distributed a royalty payment in 2004, evidence that it paid rent for one month in 2005, and evidence that the petitioner's president is a member of a professional association in the United States. The petitioner provided no explanation as to how the submitted evidence establishes that the company was doing business for the previous year. This minimal evidence, considered with the petitioner's incomplete 2004 tax return which showed limited activity at best, led the director to the reasonable conclusion that the U.S. company is not engaged in the regular, systematic and continuous provision of goods and/or services in the United States.

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).

The petitioner now submits additional evidence on appeal in an attempt to establish that the U.S. company is doing business. 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 need 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.*

Furthermore, the newly submitted evidence does not support a conclusion that the U.S. company is doing business as defined in the regulations. Counsel asserts that the petitioner is involved in ongoing "joint ventures" and submits a single consultancy agreement entered into by the petitioner in 2000. If this agreement is still active, as claimed by counsel, it is reasonable to expect the petitioner to submit documentary evidence of recent commission payments pursuant to the terms of the agreement. 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)). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The petitioner's 2004 bank statements, while they indicate receipt of a few significant wire transfers, are inadequate to establish that the company is actively doing business in the United States. The petitioner has provided no explanation regarding how the petitioner's bank statements reflect the company's business activities for the year, nor has it offered corroborating evidence that the company has received any payments from any source in exchange for the provision of goods and/or services. Similarly, the petitioner's attendance of one three-day conference in 2004 and its claimed purchase of computer equipment, without further evidence, do not establish that the company has been and will be doing business. Counsel's explanation that the company "does not generate large numbers of invoices, purchase orders or other such documentation," is simply insufficient to compensate for the paucity of documentation provided in support of this petition. At a minimum, the petitioner should reasonably be able to document the income figure stated on its Form 1120S, as well as provide business correspondence or other documentation of the company's claimed marketing and business development activities in the United States. Again, 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. at 165. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The AAO notes that much of the evidence submitted relates to the foreign entity or other Nigerian companies to which the petitioner appears to be related in some way. However, the petitioner is required to establish that the U.S. company that will employ the beneficiary is actively doing business in the United States. Based on the current record, the AAO cannot conclude that the petitioner is providing goods or services in a regular, systematic or continuous manner. Accordingly, the appeal will be dismissed.

Although not addressed by the director, the AAO further finds that the record as presently constituted is insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The record contains no comprehensive description of the beneficiary's proposed duties in the United States and therefore fails to demonstrate that he would be employed in a qualifying capacity as managing director. In its supporting letter, the petitioner merely stated that the beneficiary "will assist the company's President in marketing seismic data," and "will generate new business for the company's

new seismic center in Nigeria." This limited description suggests that the beneficiary will be directly involved in marketing and selling the foreign entity's product and services. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 604 (Comm. 1988).

Further, the director specifically requested an organizational chart for the U.S. entity that identifies each employee by name, job title and educational level. The organizational chart submitted in response showed the beneficiary as "deputy chairman & general manager," reporting to a vice president, who in turn reports to the president of the company. The petitioner identified the positions of geophysicist, accounting, marketing and technical support under the beneficiary's position, but provided no names or job titles for these positions. 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). Further, although the petitioner stated that it employs four individuals in its Houston, Texas office, the petitioner's 2004 IRS Form 1120S shows that the company paid no salaries or wages. The persons identified as the company's president and vice president are both members of the limited liability company, but the petitioner has not established the employment of any other personnel in the United States. Again, 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. at 591-92.

Based on the petitioner's indication that the beneficiary would perform non-qualifying marketing activities in the United States, the petitioner's failure to document its claimed staffing levels, and the petitioner's inability to demonstrate that the U.S. company is actually doing business, the AAO cannot find that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity. 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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.