



U.S. Citizenship
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Services

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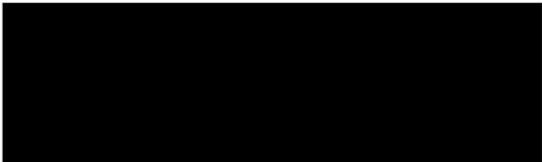


File: WAC 02 262 52969 Office: CALIFORNIA SERVICE CENTER Date: JUL 07 2006

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

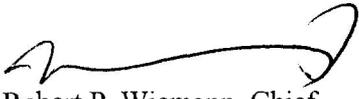
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Chief
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 appeal will be dismissed.

The petitioner is described as a software developer for electronic business solutions. It seeks authorization to employ the beneficiary temporarily in the United States as a software engineer-application integration. The director determined that the petitioner had not established that a qualifying relationship exists between the U.S. company and the foreign company because the petitioner did not submit evidence that established the petitioner is the affiliate of the foreign company.

On appeal, counsel states that the petitioner is the affiliate of the foreign company and they have a qualifying relationship because the parent company, located in the U.K., wholly owns the Indian affiliate and is the majority owner of the petitioner.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

At issue in this proceeding is whether a qualifying relationship exists between the petitioning company and the claimed affiliate company.

The regulations at 8 C.F.R. § 214.2(l)(ii)(G) define the term "qualifying organization" as follows:

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.

8 C.F.R. § 214.2(l)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. § 214.2(l)(ii)(J) states:

Branch means an operating division or office of the same organization housed in a different location.

8 C.F.R. § 214.2(l)(ii)(K) states:

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.

8 C.F.R. §214.2(l)(ii)(L) states, in pertinent part:

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.

The petitioner, [REDACTED] located in Fremont, California, claims to be an affiliate of [REDACTED], located in India. The petitioner

claims the parent company is [REDACTED], located in the United Kingdom. In support of these claims, the petitioner submitted the following: a copy of the Limited Liability Company Operating Agreement; Minutes of a Meeting of Directors of [REDACTED] Offshore Services Limited, dated January 8, 2002; and a Certificate of Incorporation and Memorandum of Association for [REDACTED] India. Additionally, the petitioner submitted a letter from [REDACTED] auditing and accounting firm which states that [REDACTED] India is wholly-owned by [REDACTED].

On September 14, 2002, the director issued a notice of intent to deny. In this notice, the director stated:

the evidence of record contains an operating agreement which shows that [REDACTED] (entity) is owned by [REDACTED] (60%) and [REDACTED] (40%); on the other hand it is indicated on the operating agreement that [the Indian entity] is owned 100% by [REDACTED] Offshore Services [REDACTED].

On September 16, 2002, the petitioner responded to the U.S. Citizenship and Immigration Services' (CIS) notice of intent to deny. The petitioner stated "[t]he Notice incorrectly states that [the petitioner] is owned 60% by [REDACTED] and 40% by [the U.K. entity]. In fact, [the petitioner] is owned 55% by the [U.K. entity] and 45% by [REDACTED]. The petitioner attached selected pages of the petitioner's operating agreement. The operating agreement was submitted in its entirety with the initial petition. Counsel asserted that [REDACTED] is the majority owner of the petitioner. Counsel also stated "[the petitioner] and the [Indian entity] are affiliates since they are owned and controlled by the same parent"

On September 19, 2002, the director issued his decision denying the petition. The director summed up the petitioner's argument which is based on Article 2, Section 2.5 of the Operating Agreement which states as follows:

(b) The total number of Membership Units that the company shall have the authority to issue is One Hundred Thousand (100,000). On the date of this A, Fifty Five Thousand (55,000) Membership Units are issued and outstanding and held of record by [REDACTED] and Forty Five Thousand (45,000) Membership Units are issued and outstanding and held of record by [REDACTED].

The director notes additionally that the Operating Agreement at Article 3, Section 3.1. Initial Capital Contribution, states as follows:

(a) On the date hereof, [REDACTED] has made an initial cash Capital Contribution in the amount of Forty Thousand US Dollars (\$40,000).
(b) On the date hereof [REDACTED] has made an initial cash Capital Contribution in the amount of One Hundred Thousand U.S. Dollars (\$100,000).

The director notes that Section 3.2 of the Operating Agreement states in part:

(a) Each Member shall contribute to the Company . . . based on its Percentage Interest.

The director stated “it’s not clear why [REDACTED] and [REDACTED] did not make cash contributions proportionate to their interest.” In conclusion, the director determined there was insufficient evidence to demonstrate that the U.S. entity and [REDACTED] India are affiliates pursuant to 8 C.F.R. 214.2(l)(1)(ii)(L).

On appeal, counsel for the petitioner asserts that the director simply misread the Operating Agreement. Counsel for the petitioner restates the above-stated sections of the Operating Agreement. Additionally, counsel resubmits a letter from [REDACTED]’s accountants which declares that [REDACTED] India is a wholly-owned subsidiary of [REDACTED]. Counsel asserts that the director:

took Section 3.2 (Additional Capital Contributions) out of context as referring to initial capital contributions where there was indeed a 60/40 investment. In fact, this out of context interpretation is evident from [the director’s] selective reference of the text of this section without applying the words of the paragraph of this section in their entirety. The dollar investment for initial capital contributions has nothing to do with ownership.

Upon review of the record, the AAO is in agreement with the petitioner that the director misread the Operating Agreement of the petitioner. Based on the evidence provided, the U.K. company owns 55 percent of the petitioner, the United States entity.

However, upon review of all of the documents provided, the AAO finds that there is insufficient evidence to demonstrate that [REDACTED] wholly owns the claimed Indian affiliate as stated by the petitioner.

The petitioner provided the Memorandum of Association for the Indian entity, [REDACTED] India. The claimed parent company, [REDACTED], is not named as an owner in this document. Instead, this Memorandum of Association lists two equity shareholders. The first equity share holder is [REDACTED] and he is listed as subscribing to one equity share. The name of the second equity shareholder is [REDACTED] who is listed as subscribing to one equity share. The petitioner did submit a letter from [REDACTED] Accounts and registered Auditors that states that the Indian entity is a wholly-owned subsidiary of [REDACTED]. However, the petitioner has not explained the discrepancy in ownership between [REDACTED] India’s Memorandum of Agreement and the assertion by the accountants. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the record of proceeding there is insufficient evidence to determine that there is a qualifying affiliate relationship between the U.S. entity and the Indian entity. The documents provided do not clearly demonstrate that [REDACTED] owns [REDACTED]. Therefore, this petition must be denied.

Beyond the decision of the director, it is noted that the petitioner is requesting an L-1B specialized knowledge classification for a Software Engineer – Application Integration in order to open a new office. The regulations state in pertinent part:

8 C.F.R. § 214.2(l)(3)(ii) states that an individual petition filed on Form I-129 shall be accompanied by:

- (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.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

An alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) states:

Specialized Knowledge means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The petitioner has not furnished evidence sufficient to demonstrate that the beneficiary's duties involve knowledge or expertise beyond what is commonly held in his field or by other software engineers in the Indian entity. Contrary to counsel's argument, mere familiarity with an organization's product or service, such as knowledge of its process connectors and the SeeBeyond integration software platform, does not constitute specialized knowledge under section 214(c)(2)(B) of the Act. For this additional reason, this petition may not be approved.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed in a specialized knowledge position or that the beneficiary is to perform a job requiring specialized knowledge in the proffered position. Although the petitioner asserts that the beneficiary's position requires specialized knowledge, the petitioner has not articulated any basis to the claim that the beneficiary is employed in a capacity requiring specialized knowledge. Other than submitting a general description of the beneficiary's job duties, the beneficiary has not identified any aspect of the beneficiary's position which involves special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests. The petitioner has not submitted sufficient evidence of the knowledge and expertise required for the beneficiary's position that would differentiate that employment from the position of "software engineer – application integration" at other employers within the industry. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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).

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.