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U.S. Citizenship
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File: SRC 04 104 50477 Office: TEXAS SERVICE CENTER Date: **MAR 31 2006**

IN RE: Petitioner:
Beneficiary:



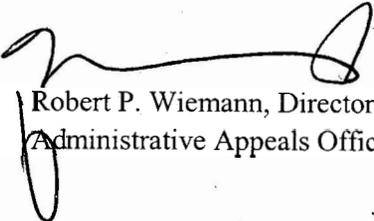
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Director
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 is a limited liability company organized in the State of Florida that intends to engage in scuba equipment purchase, export and consulting. The petitioner claims that it is the affiliate of [REDACTED] located in Sao Paulo, Brazil. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a one-year period.

The director denied the petition concluding that the petitioner had not established: (1) that the U.S. company and the foreign entity have a qualifying relationship; or (2) that the beneficiary had been employed by a qualifying foreign entity for at least one continuous year in the three years preceding the filing of the petition. The director also observed that the petitioner did not provide evidence that the foreign company had provided funds for the new U.S. entity.

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 submits additional documentation in support of the claimed qualifying relationship between the petitioner and the foreign entity, and asserts that the petitioner's articles of organization have been amended to reflect ownership by the claimed foreign parent company. With respect to the beneficiary's employment abroad, counsel asserts that the company that employed the beneficiary and the petitioner's claimed parent company are "in essence the same company" based on common ownership by an individual and thus the petitioner has established that the beneficiary was employed by a qualifying organization. Counsel submits a brief, previously submitted evidence, 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 regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides that 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 first issue in the present matter is whether the petitioner has established a qualifying relationship between the U.S. entity and the beneficiary's foreign employer.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in relevant part:

- (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, subsidiary or affiliate 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.

* * *

(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.

(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 entirely owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity[.]

The nonimmigrant petition was filed on February 27, 2004. On the L Classification Supplement to Form I-129, the petitioner indicated that it is the affiliate of [REDACTED], located in Sao Paulo, Brazil and stated that the beneficiary is the "owner [and] president" of the petitioning company. In a February 24, 2004 letter appended to the petition, the president of the foreign entity refers to the U.S. petitioner as an "affiliate of the Brazilian parent company [REDACTED] later acquired by [REDACTED]. The president of the foreign entity further stated that the beneficiary was employed by the "Brazilian parent company, [REDACTED] from January 1999 through May 2002.

The petitioner submitted supporting documentation, including: (1) the U.S. entity's Florida articles of organization, filed on February 20, 2004, identifying the beneficiary as the company's manager; (2) a

February 2004 affidavit executed by the beneficiary, who attests to being the "Sole Member and Manager" of the U.S. entity; (3) an untranslated document in the Portuguese language, dated February 5, 2003, bearing the handwritten notation "[REDACTED] Article of Incorporation"; (4) an untranslated document in the Portuguese language, dated April 1, 1999, bearing the handwritten notation "[REDACTED] Articles of Incorporation"; (5) an untranslated document in the Portuguese language, dated August 1, 2003, bearing the handwritten notation "Amendment of Article of Incorporation – the acquisition of [REDACTED]"; (6) a January 28, 2004 letter, with English translation, from the "company shareholder and officer" of [REDACTED], stating that [REDACTED] was acquired by [REDACTED] "having all of its operational activities as well as its employees being incorporated into the new company"; and (7) a January 31, 2004 letter, with English translation, from [REDACTED] confirming that the beneficiary was hired by that company as a commercial operations manager on January 30, 1999.

On May 12, 2004, the director requested additional evidence, in part instructing the petitioner to submit: a copy of the operating agreement for the U.S. company and evidence that the foreign company has invested in the U.S. company, including evidence of wire transfers to the U.S. company or other documentation that will show the money invested and how it was sent to the United States.

The petitioner submitted a response dated August 10, 2004, which included a February 23, 2004 operating agreement for the U.S. limited liability company, identifying the beneficiary as the sole manager, and the company's membership as follows:

Initial Members	Percentage Interest in LLC	Capital Contribution
[The beneficiary]	49%	\$1,500
[REDACTED]	51%	\$1,500

The petitioner also submitted copies of fifteen "incoming wire transfer notices" from [REDACTED] addressed to the beneficiary, identified by counsel as "copies of Brazilian parent corporation[']s wire transfers into [the beneficiary's] bank account, proving ongoing investment." The wire transfer notices, which total payments in the amount of \$17,694 between November 18, 2003 and July 30, 2004, all identify the "originating party" as [REDACTED] and the beneficiary as the recipient of the funds.

The director denied the petition on August 23, 2004, concluding that the petitioner had not established a qualifying relationship between the petitioner and the beneficiary's foreign employer. The director observed inconsistencies in the submitted evidence, noting that the petitioner submitted a notarized statement from the beneficiary identifying him as the sole member of the company, as well as an operating agreement identifying the foreign entity as a member with a 51 percent interest. Due to the conflicting evidence, the director found that it was impossible to determine whether any relationship existed between the two companies.

The director further noted that the petitioner failed to establish that the claimed parent company had funded the U.S. entity. Specifically, the director remarked that the foreign entity's name did not appear as the originator of the submitted wire transfers, nor was the money deposited to the U.S. company's bank account.

On appeal, counsel for the petitioner asserts that the petitioner is a majority-owned subsidiary of [REDACTED] and submits the petitioner's amended articles of organization filed with the Florida Department of State on August 30, 2004. The amended articles of organization state: "The Brazilian company, [REDACTED] is added as a managing member to the "member managed LLC" in accordance with the LLC operating agreement, which indicates that said Brazilian company . . . retains 51% of the interest in the LLC."

Counsel further explains the petitioner's late filing of the amended articles of organization as follows:

We had not added the foreign parent company [REDACTED] as a Member (at time of formation of the Florida LLC) due to our wrong assumption that foreign companies no longer could be shareholders or own stock of U.S. entities, after the institution of the Patriot Act. Upon further research, however, we found out that foreign entities can be members of Limited Liability Companies (LLCs), thus, we have added [REDACTED] accordingly.

With respect to the funding of the U.S. company by the claimed parent company, counsel states that the monies sent by the foreign entity to date have been "modest" due to the lack of an L-1A visa approval for the beneficiary, and notes that the payments were initially made to the beneficiary's account so that he could pay for start up expenses. Counsel asserts that the most recent wire transfers have gone to the U.S. entity's business checking account and submits an account transaction history showing that the petitioning company received wire transfer deposits in the amounts of \$1,000 and \$1,250 on August 30, 2004 and September 15, 2004, respectively. The petitioner does not provide copies of the wire transfer deposit slips or receipts identifying the originator of these funds.

The petitioner also submits a signed declaration from [REDACTED], who states: "I declare . . . that [the beneficiary] receives, through [the petitioning company], money wire transfers corresponding to start-up [sic] business costs and business maintenance, a business in which I keep investing into, as part of the [REDACTED] Mr. [REDACTED] further states that the wire transfers "are effectuated through the company [REDACTED]"

Finally, the petitioner submits additional evidence intended to establish the relationship between the Brazilian company that employed the beneficiary, [REDACTED] and the petitioner's claimed parent company [REDACTED]. Counsel asserts that both [REDACTED] and [REDACTED] are owned by the same individual, [REDACTED]. Counsel further asserts that both companies remain in existence as part of the same group and are "in essence, the same company, having always had Mr. [REDACTED] as Owner and President with full control . . ." Counsel comments on the complexity of Brazil's corporate laws, noting that "farfetched requisites, hindrances and limitations lead people to circumvent certain restrictions by finding other ways to form companies." Counsel reiterates that [REDACTED] "has always been the President and Owner of both entities, which in essence, have been the same company, in the same line of business, from its original formation date to the present." In support of these assertions, counsel submits "several amendments" made to the Articles of Incorporation of [REDACTED] which counsel states will establish that the company is owned by [REDACTED]. Counsel attaches corporate documents for [REDACTED] dated April 1, 1999, August 16, 1999, October 28, 2002 and December 1, 2003, along with a summary

translation stating that these documents evidence that [REDACTED] and [REDACTED] are the company's shareholders.

Upon reviewing the petition and the evidence, the petitioner has not established that it has a qualifying relationship with the beneficiary's last foreign employer as required by 8 C.F.R. § 214.2(l)(3)(i). The AAO reaches this conclusion by noting a number of inconsistencies in the record regarding the actual ownership and control of the U.S. entity. The petitioner has also submitted conflicting evidence regarding the ownership, control and continued existence of the beneficiary's foreign employer.

As a preliminary matter, however, the AAO notes that the majority of the evidence submitted to establish the ownership and control of the beneficiary's foreign employer, the petitioner's claimed parent company, and the ongoing business operations of both companies was submitted in the original Portuguese without accompanying certified English translations. Because the petitioner failed to submit the required certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. See 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and need not be accorded any weight in this proceeding.

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 the 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 International*, 19 I&N Dec. at 595.

As noted by the director, the petitioner submitted inconsistent evidence regarding its ownership and control by initially referring to the beneficiary as the "owner" and submitting a sworn statement from him indicating that he was the sole member and manager of the limited liability company at the time of filing. Although the petitioner subsequently submitted an operating agreement identifying the claimed parent company as a member with a majority interest in the U.S. company, the AAO notes that this document alone is insufficient to establish that the petitioner is a subsidiary of the claimed parent company. Furthermore, the petitioner did not file its amended articles of organization identifying the foreign entity as a member until one week after the director denied the petition.

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Counsel's assertion that the petitioner previously believed it was prohibited by law from naming a foreign shareholder on its corporate documentation does not qualify as independent and objective evidence. 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). Furthermore, evidence that the petitioner creates after CIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and

objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

The record is devoid of any secondary evidence to establish that the foreign entity actually has an ownership interest in the petitioning company. The record does not contain the petitioner's membership certificates, or any evidence that funds have been transferred to the U.S. entity in exchange for the foreign entity's membership interest. The foreign entity's director's unsupported statement that he invests in the U.S. company by transferring money directly to the beneficiary through an unrelated third company is simply insufficient to establish that the claimed parent company has provided any funds to the petitioner. At a minimum, the petitioner would need to show monies transferred to the third company from its corporate account, copies of the actual wire transfers, and evidence that the beneficiary subsequently transferred the money to the petitioner's corporate account prior to the filing of the petition. 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 petitioner has not established that it is a subsidiary of Ocean Pro Esportes Ltda.

Regardless, even if the petitioner had established that it is a subsidiary of [REDACTED] the beneficiary's last foreign employer was a separate company, [REDACTED] and the petitioner must therefore submit evidence that it has a qualifying relationship with this company.

As noted above, the petitioner initially stated that the company that employed the beneficiary from January 1999 through May 2002 was later acquired by [REDACTED]. The petitioner submitted untranslated documents that were purportedly intended to establish that the beneficiary's employer had been acquired by [REDACTED] as well as a declaration from the [REDACTED] shareholder and officer specifically stating that all of [REDACTED] operational activities and employees had been "incorporated into the new company."

On appeal, counsel asserts that both companies continue to exist and are essentially the same company, owned by the same individual. Neither counsel nor the petitioner provides an explanation for, or even acknowledges, the petitioner's previous statements that [REDACTED] acquired the beneficiary's foreign employer prior to the filing of the petition. Furthermore, the untranslated supporting evidence submitted on appeal contradicts counsel's claims that the two foreign entities share common ownership and control. The most recent corporate document provided for [REDACTED]

[REDACTED], dated December 1, 2003, indicates the ownership of the company as follows: [REDACTED] - 47,500 *quotas*; [REDACTED] - 2,499 *quotas*; and [REDACTED] 1 *quota*. The articles of incorporation for [REDACTED] dated February 3, 2003, indicate the ownership of the company as follows: [REDACTED] - 9,900 *quotas*; and [REDACTED] - 100 *quotas*. Based on the documentation submitted, the majority owner of the beneficiary's last foreign employer has no ownership interest in [REDACTED]. Although [REDACTED] is a shareholder of both companies, he has only a five percent ownership interest in the beneficiary's last foreign employer. The petitioner has not submitted evidence to substantiate its new claim

that the foreign entities are, in fact, affiliates, nor has it provided an explanation for its previous claim that the petitioner's claimed parent company was a successor-in-interest to the beneficiary's foreign employer.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the petitioner and beneficiary's eligibility is not credible.

Pursuant to the foregoing discussion, the petitioner has not established that the U.S. entity and the beneficiary's foreign employer have a qualifying relationship. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner established that the beneficiary had at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii).

The petitioner has submitted evidence that the beneficiary was employed by [REDACTED] for one year within the three years preceding the filing of the petition. However, as discussed above, there is no evidence that this foreign company is a qualifying organization as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G). For this additional reason the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity abroad. *See* 8 C.F.R. § 214.2(l)(3)(iv). Although the beneficiary is described as an "international market consultant manager," the petitioner did not describe duties performed by the beneficiary in a managerial or executive capacity. The job description provided includes many operational duties such as as "satisfying the requisites of Brazilian customs/health department agencies," "marketing the product," "international market consulting and administrative matters," and "locating . . . international manufacturers and distributors." Furthermore, the organizational chart submitted for the foreign entity shows the beneficiary's title as "new business development/buyer" with no subordinates, and no other marketing or purchasing staff employed within the organization. The evidence in the record suggests that the beneficiary primarily performed marketing, consulting and purchasing duties while employed by the foreign entity. 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). For this additional reason, the petition will be denied.

Another issue not addressed by the director is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as required by 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner indicated that the U.S. company intends to hire only one employee, a

“clerical person” during the first year of operations, while the beneficiary will supervise the document preparation activities performed by the clerical employee, draft freight forwarding documents, address customer service issues, and “conduct all research, U.S. purchasing, exportation to Brazil, contract negotiation, contract formation.” Based on the limited description **provided** by the petitioner, the beneficiary, despite his responsibility for overseeing the U.S. office, will perform primarily non-qualifying duties associated with the petitioner’s purchasing, sales, marketing and customer service functions at the end of the first year of operations. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F.2d 41 (2d. Cir. 1990). In addition, the petitioner did not fully describe the proposed nature of the office, the scope of the entity or its financial goals, or disclose the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(B) and (C). This evidence submitted does not 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. For this additional reason, the petition will be denied.

Finally, the record does not establish that the petitioner has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A). At the time of filing, the petitioner indicated the beneficiary’s residential apartment as its “temporary address.” The petitioner did not sign a commercial lease until March 15, 2004, several weeks after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, the petitioner has not described its anticipated space requirements for its export and consulting business and the lease in question does not specify the amount or type of space secured. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner had secured sufficient space to house the new office at the time the petition was filed. For this additional reason, the petition will be denied.

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 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.

ORDER: The appeal is dismissed.