

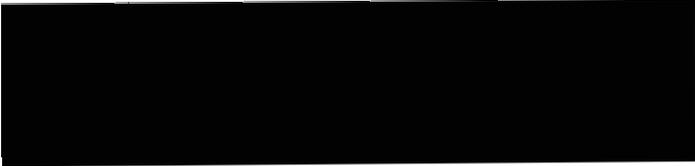


U.S. Citizenship
and Immigration
Services

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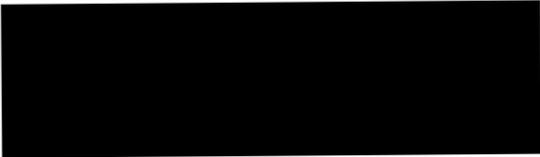
File: SRC 04 163 52329 Office: TEXAS SERVICE CENTER Date: MAR 31 2006

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)

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, 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 corporation organized in the State of Florida that claims to be an affiliate of [REDACTED] located in Bogota, Colombia. It operates a restaurant and bakery. The petitioner seeks to employ the beneficiary as its president for a three-year period.

The director denied the petition concluding that the petitioner did not establish a qualifying relationship between the United States entity and the foreign entity. The director found insufficient evidence to show that the foreign entity and U.S. petitioner share common ownership and control.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director denied the petition based on the petitioner's failure to submit evidence that was neither required by regulation nor requested by the director. Counsel asserts that the petitioner submitted sufficient evidence to establish that the two entities are majority owned and controlled by the same group of individuals and therefore qualify as affiliates pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). Counsel submits a brief and additional 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 issue in this proceeding is whether the beneficiary's foreign employer and the U.S. entity are qualifying organizations as required in the regulation at 8 C.F.R. § 214.2(l)(3)(i).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

- (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, 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[.]

* * *

- (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
 - (I) 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 nonimmigrant petition was filed on May 20, 2004. The petitioner stated on Form I-129 that the petitioner is an affiliate of [REDACTED] of Colombia, and submitted a partial translation of the foreign entity's articles of incorporation, which indicates that the foreign entity has issued 250,000,000 shares with its ownership divided as follows:

[REDACTED]	925,000	0.37%
[REDACTED]	26,225,000	10.49%
[REDACTED]	53,875,000	21.55%
[REDACTED]	1,225,000	0.49%
[REDACTED]	53,950,000	21.58%
[REDACTED]	42,150,000	16.86%
[REDACTED]	10,350,000	4.14%
[REDACTED]	61,300,000	24.52%
Total	250,000,000	100%

The petitioner submitted its Florida articles of incorporation, which were filed on November 12, 2002. The articles of incorporation indicate that the petitioner is authorized to issue 500 shares of stock valued at \$1.00 per share, and provide, at Article V, the following information regarding its initial officers/directors and their ownership interest in the company: [REDACTED] President (20%); [REDACTED] Vice President (10%); [REDACTED] Manager (10%); [REDACTED] Treasurer (15%); [REDACTED] Director (10%); [REDACTED] Director (15%); [REDACTED] Director (10%); and [REDACTED] Secretary (10%). The petitioner provided a copy of its IRS Form 1120, U.S. Corporation Income Tax Return, for the fiscal year ended on October 31, 2003, which indicates at Schedule L, Line 22, that the petitioner's common stock is valued at \$500.

The petitioner also attached to Form I-129 as "Exhibit 'A'" a summary of the ownership of each company. The petitioner indicated that the same six individuals own 80 percent of the U.S. company and 75.11% of the foreign company as follows:

	U.S.	Foreign
[REDACTED]	20%	16.86%
[REDACTED]	10%	21.58%
[REDACTED]	10%	21.55%
[REDACTED]	15%	10.49%
[REDACTED]	10%	4.14%
[REDACTED]	15%	0.49%
[REDACTED]	80%	75.11%

On May 26, 2005, the director requested additional evidence, in part instructing the petitioner to submit documentary evidence to establish the ownership and control of both the foreign and United States entities. The director advised that this evidence could be in the form of stock certificates/stock register or copies of published annual reports. The director separately requested copies of stock certificates which clearly state who owns the United States company.

In a response dated August 25, 2004, the petitioner submitted the U.S. company's stock certificates numbers 1, 2, and 4 through 8, noting that stock certificate number three had been lost and replaced by certificate number four. All seven of the submitted stock certificates indicate on their face that the company is authorized to issue 500 shares of common stock at \$1.00 par value. All of the stock certificates, including stock certificate number four, which is purportedly a replacement for a lost certificate, are dated March 1, 2004, approximately 14 months following the petitioner's date of incorporation. The petitioner did not provide a stock transfer ledger. The stock certificates show that a total of 249,500 shares were issued to the following individuals:

Number 1	[REDACTED]	50,000 shares
Number 2	[REDACTED]	32,500 shares
Number 4	[REDACTED]	22,500 shares
Number 5	[REDACTED]	22,500 shares
Number 6	[REDACTED]	22,500 shares
Number 7	[REDACTED]	67,500 shares
Number 8	[REDACTED]	32,000 shares

The petitioner submitted an undated, partial copy of its Articles of Amendment to Articles of Incorporation which amends Article 5 to name a new board of directors as follows: [REDACTED] president, [REDACTED] as vice-president, [REDACTED] director, [REDACTED] as manager, [REDACTED] treasurer, [REDACTED] as director and Ped [REDACTED] as director.

The petitioner re-submitted the articles of incorporation for the foreign entity detailing its ownership as described above, but did not provide copies of stock certificates or a stock transfer ledger for the foreign company.

The director denied the petition on September 8, 2004, concluding that the petitioner had not established the claimed affiliate relationship between the U.S. and foreign entities. The director summarized the ownership structure of each entity and concluded that the evidence submitted does not establish that the owners of both the U.S. and Colombian entities "own the same share or portion of both the entities as required by the regulations." The director noted that the petitioner had not submitted evidence to establish that the owners of the U.S. company had actually paid for their shares, had omitted its stock ledger, and had not submitted documentary evidence to establish control of the entity. Specifically, the director observed that the petitioner had failed to provide evidence of voting agreements between shareholders, making it impossible to determine who exercises control over the U.S. and foreign entities.

On appeal, counsel for the petitioner asserts that the petitioner and the foreign entity qualify as affiliates pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(L)(2) as two legal entities owned by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. Counsel asserts that the same five individuals own 75 percent of the foreign entity and 60 percent of the petitioning entity, and therefore “the US and foreign companies are majority owned by the same shareholders.”

Counsel also objects to the director’s denial of the petition based on the petitioner’s failure to provide documentary evidence “to establish the shares issued to the US entity owners were paid and/or establish control.” Counsel asserts that the regulations do not require the petitioner to submit an agreement related to the voting of shares, but rather requires that “each party have ‘equal control and veto power over the entity.’” Counsel states that the petitioner’s by-laws establish that “a majority of the quorum must agree on the actions of the company. The US and foreign companies are majority owned by the same shareholders.”

In support of these assertions, the petitioner submits an October 7, 2004 letter from its accountant confirming the names of the current directors of the company. Counsel also submits a document identified as the petitioner’s company by-laws. The AAO notes that the document submitted appears to be merely a template and does not contain any references to the petitioning company or its officers.

Upon review, counsel’s assertions and the submitted documentation do not establish that there is a qualifying relationship between the U.S. and foreign entities. 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* at 595.

As general evidence of a petitioner’s claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the company, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.* at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. 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, supra.*

In this matter, the foreign entity is owned by one company and seven individuals, with no shareholder owning more than 24.52 percent of the company's shares. The U.S. entity appears to be owned by seven or eight individuals, although, as discussed below, the petitioner has provided inconsistent accounts of the U.S. company's actual ownership. While five or six of these individuals also have an ownership interest in the foreign entity, this type of "common ownership" does not fall under the statutory definition of affiliate at 8 C.F.R. § 214.2(l)(1)(ii)(L). CIS has never accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. While counsel asserts that the regulations do not specifically require a petitioner to submit agreements related to the voting of shares, the regulations clearly require the petitioner to establish that the claimed affiliate companies share common control. The director in this matter did not specifically request that the petitioner submit voting agreements or proxies, but the director's decision provided the petitioner with adequate notice of the deficiencies in its evidence for the petitioner to provide appropriate rebuttal evidence on appeal.

On appeal, counsel relies solely on the fact that the petitioner and foreign entity have common shareholders; counsel neither claims nor provides evidence that these same individuals have formally agreed to vote in concert so as to exercise majority control over both entities. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Counsel submits the petitioner's claimed "by-laws," which as noted above, do not even reference the petitioning company and appear to be a template document. Regardless, the fact that the by-laws state that a majority of shares constitutes a quorum and the quorum must agree on the actions of the company is insufficient to establish that the same shareholders actually control both the U.S. and the foreign entity. It would be possible for shareholders of the U.S. company to form a quorum without including all of those shareholders who also own an interest in the foreign entity. Further, the petitioner has not provided the by-laws or other documentation that would assist in establishing the actual control of the foreign entity. 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)).

Moreover, as alluded to by the director, the petitioner has provided inconsistent evidence of the U.S. company's ownership that also precludes a finding that the company has a qualifying relationship with the foreign entity. The U.S. company was incorporated in November 2002 and authorized to issue 500 shares of stock with a par value of \$1.00 per share. The petitioner's 2002 IRS Form 1120, U.S. Corporation Income Tax Return, confirmed that the value of the petitioner's common stock as of October 31, 2003 was \$500.00, suggesting that all of the company's stock had been issued and paid for prior to that date. The petitioner initially claimed to have eight shareholders, each owning 10, 15 or 20 percent of the petitioner's stock, and these shareholders were named in Article V of the petitioner's articles of incorporation. In response to the director's request for evidence, the petitioner provided copies of seven stock certificates issued to seven individuals, two of whom were not initially named as shareholders [REDACTED] and [REDACTED].

The petitioner did not submit stock certificates issued to two of the initial claimed shareholders [REDACTED]

As noted by the director, the petitioner's stock certificates show that 249,500 shares were issued, although there is no evidence that the company was authorized to issue more than 500 shares. All of the stock certificates submitted were dated March 1, 2004, although the company was formed in November 2002. The petitioner claims that stock certificate number three was lost and replaced by certificate number four, but stock certificate number four was issued on the same day as all of the other certificates. Although requested by the director, the petitioner chose not to provide a copy of its stock transfer ledger, which would have identified all stock certificates issued to date, verified the reissuance of the "lost" certificate, reflected any changes in ownership, and provided the amount paid by each shareholder for his or her interest in the company. 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). 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).

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. at 591. In this case, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the petitioner's eligibility is not credible.

Based on the foregoing discussion, the petitioner has not established that the U.S. and foreign entities are affiliates. Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity in the United States as required by 8 C.F.R. § 214.2(l)(3)(ii). The petitioner initially provided a generic job description that appears to have been taken verbatim from the Department of Labor's *Dictionary of Occupational Titles*. As such the provided description did not provide the required detailed account of the duties to be performed in a managerial or executive capacity. *See id.* Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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). The director specifically requested a definitive statement regarding the beneficiary's U.S. employment, and the petitioner failed to provide additional information pertaining to his actual job duties in response to the director's request. Any 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's evidence also failed to establish that the company had sufficient staffing to relieve the beneficiary from performing first-line supervisory or operational duties associated with operating the petitioner's restaurant/bakery. The petitioner claimed to employ six employees as of the date the petition was filed, and, in response to the director's request for evidence, claimed to have ten employees. The petitioner has not provided evidence of the actual number of employees working for the company as of the date of filing in May 2004. The record does contain the petitioner's Florida Forms UCT-6, Employer's Quarterly Report, for the last quarter of 2003 and the first quarter of 2004, the quarter immediately preceding the filing of the petition. These records show that the U.S. entity employed five employees throughout the last quarter of 2003, four employees in January and February 2004, and only three employees as of March 2004, including two "production employees," and an employee who was not identified on the petitioner's organizational chart. Absent evidence that the petitioner employed sufficient production staff/cooks, sales personnel, delivery personnel, and supervisory staff to oversee these lower-level employees, the petitioner has not established that the beneficiary would be relieved from performing primarily non-qualifying duties associated with operating the petitioner's restaurant/bakery business. 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).

The lack of evidence in the record regarding the beneficiary's actual duties and the petitioner's organizational structure as of the date of filing prohibits a finding that the beneficiary would be employed in a primarily managerial or executive capacity. For this additional reason, the appeal will be dismissed.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.