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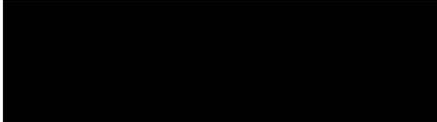
File: SRC 05 138 51042 Office: TEXAS SERVICE CENTER Date: **OCT 23 2006**

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 BENEFICIARY:



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 in the position of president and general manager to open a new office in the United States as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a corporation organized under the laws of the State of Texas, claims to be a tortilleria and alleges that it has a qualifying relationship with a group of Mexican tortillerias.¹

The director denied the petition concluding that the petitioner failed to establish that the United States operation will support an executive or managerial position within one year. Specifically, the director concluded that the petitioner did not establish that the foreign entity had made an investment in the United States operation.

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, the petitioner asserts that the director erred in denying the petition because the record establishes that the foreign entity, and not the beneficiary, invested sufficient funds in the United States operation.

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(i)(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

¹It should be noted that, according to Texas state corporate records, the petitioner's corporate status in Texas is not in good standing. Therefore, as the State of Texas has forfeited the petitioner's corporate privileges, the company can no longer be considered a legal entity in the United States. Therefore, as this clearly and unequivocally renders the petitioner ineligible for the classification sought, the petition could not be approved even if the other issues in this matter were overcome on appeal.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity

The primary issue in this matter is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In the initial petition, the petitioner states in the letter dated March 30, 2005 that the United States operation will be in the business of "making, selling and distributing fresh homemade style corn tortillas" and derivative products, both retail and wholesale. The petitioner provided a "forecasted financial statement," a lease signed by the beneficiary, a list of objectives of the petitioner's proposed business, and a three-phased organizational chart. The list of objectives and forecasted financial statement, while establishing the petitioner's intent to

grow its business, are not corroborated by any documentation establishing the feasibility of the objectives or the reasonableness of the forecast. Moreover, the three-phased organizational chart depicts the petitioner's business in its third phase of growth to employ the beneficiary, a vice president, an operations manager, and employees engaged in sales and in tortilla production. Again, the organizational projections are not corroborated by any supporting documentation nor do they include any job descriptions for the beneficiary or the projected subordinate employees. Finally, the petitioner failed to provide any evidence of an investment in the United States operation.

On April 26, 2005, the director requested additional evidence. The director requested, *inter alia*, evidence of the funding or capitalization of the United States operation.

In response, the petitioner provided a letter from the beneficiary explaining that he sold a house and two vehicles to raise the money to buy equipment to start the United States operation. The petitioner also provided copies of the beneficiary's personal, foreign bank statements purporting to show relevant activity, including the deposit of the proceeds from the sale of the house and vehicles in Mexico. No bank statements for the petitioner were provided.

On May 18, 2005, the director denied the petition. The director determined that the petitioner failed to demonstrate that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position due to the petitioner's failure to establish any investment in the United States operation.

On appeal, the petitioner asserts that the record establishes that the foreign entity, and not the beneficiary, invested sufficient funds in the United States operation and that this establishes that the United States operation, within one year of the approval of the petition, will support an executive or managerial position.

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

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

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

entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

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

Id.

In this case, the "forecasted financial statement," the list of objectives of the petitioner's proposed business, and the three-phased organizational chart submitted by the petitioner collectively fail to prove that the enterprise will likely 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. The documents fail to corroborate any of its assertions with documentation, studies, or independent analyses. Given this lack of corroboration, the documents do not credibly explain the scope of the entity or its financial goals nor does it outline a credible plan for expansion beyond the initial start-up phase. Also, since the three-phased organizational chart fails to provide any timelines, it is impossible to determine in which stage the petitioner expects to be by the end of its first year in business. Therefore, the petitioner has failed to present evidence sufficient to prove that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position. 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, the petitioner has failed to establish that an investment has been made in the United States operation. Even accepting as true the petitioner's uncorroborated averment that the beneficiary sold a house and two vehicles to raise money to start the United States operation, there is no evidence that these assets belonged to the foreign entity² and, more importantly, there is no evidence that these assets were liquidated

²Although counsel to the petitioner asserted on appeal that these assets belonged to the foreign entity, he provided no documentary proof corroborating this assertion. 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).

and invested in the United States operation. While the petitioner provided several bank statements showing activity, including substantial deposits, these statements are for the beneficiary's personal, foreign bank account. No bank account information was provided for the petitioner. Also, while the petitioner argues that the beneficiary acquired certain equipment, there is no evidence that the petitioner has acquired this equipment.

Accordingly, the petitioner has not established that 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), and the petition may not be approved for this reason.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office as required by 8 C.F.R. § 214.2(l)(3)(v)(A). While the petitioner supplied a copy of a lease for, and photos of, its purported offices in the United States, the lease provided by the petitioner is for premises secured *by the beneficiary*. Moreover, since the beneficiary, as the tenant, is prohibited from assigning the lease or subleasing the leased premises under paragraph B(8) without the landlord's written consent, the petitioner has not established that it has secured sufficient physical premises absent evidence that the landlord has given consent. For this additional reason, the petition may not be approved.

Beyond the decision of the director, a related issue is whether the petitioner has established that it and the foreign entity are qualifying organizations as required by 8 C.F.R. § 214.2(l)(3)(i).

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.

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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." An "affiliate" is defined, in part, as "a legal entity owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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.

In the initial Form I-129 petition, the petitioner purports that the foreign entity, or foreign entities, are owned either entirely or partly by the beneficiary and his spouse who, in turn, own 100% of the petitioner, thus establishing, if true, that the entities are affiliates. In support of this contention, the petitioner provided a copy of articles of incorporation for the petitioner authorizing 100,000 shares of stock, stock certificate #1 issuing 500 shares of stock to the beneficiary, stock certificate #2 issuing 500 shares to the beneficiary's spouse, and a copy of organizational minutes. The petitioner explained the organization of the foreign entity in a letter dated March 30, 2005:

[The beneficiary] and his wife are owners of six Tortillerias in Zacatecas, Mexico. [The beneficiary], along with his wife, own and control five Mexican Tortillerias, and are in association with [the beneficiary's mother-in-law] in the original Tortilleria.

* * *

The fact that [the beneficiary] either solely or jointly with his wife own five of the six Mexican tortillerias and are partners with [the beneficiary's] mother-in-law in the tortilleria, together with the fact that [the beneficiary and his spouse] own [the petitioner], establishes the existence of a qualifying relationship between the [the petitioner] and the Mexican company, [REDACTED]

While the petitioner provided evidence regarding the activities of the foreign business, the petitioner did not provide any further evidence regarding its ownership or organization.

Upon review, the petitioner has not established that it has a qualifying relationship with the foreign employer, because it has not sufficiently established the organization, ownership, or control of this entity or entities. As explained by the petitioner, there appear to be six different businesses in Mexico with which the petitioner claims a qualifying relationship. It is unclear whether the petitioner is claiming that all six businesses are one entity, that the five tortillerias allegedly owned by the beneficiary and his spouse are one entity, or that there are six separate entities. Moreover, the petitioner has not provided sufficient documentary evidence establishing who owns and controls the foreign employer(s). 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. Without this evidence, Citizenship and Immigration Services (CIS) cannot determine whether the same group of individuals who owns and controls the petitioner also owns and controls the foreign entity.

Second, the petitioner has provided insufficient evidence to establish the ownership and control of the United States operation. In this case, the petitioner has provided stock certificates evidencing the issuance of 1,000 of the petitioner's 100,000 shares, the articles of incorporation, and the organizational minutes of the petitioner. As general evidence of a petitioner's claimed qualifying relationship, 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 subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

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 denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.