

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



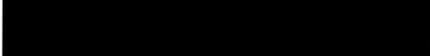
**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



D7

File: SRC 05 068 50500 Office: TEXAS SERVICE CENTER Date: **SEP 29 2006**

IN RE: Petitioner: 
Beneficiary: 

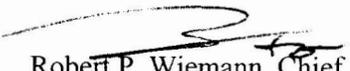
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, 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 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 Florida, claims to be engaged in the business of computer education, consulting, and exporting, and alleges that it is the affiliate of [REDACTED] and [REDACTED], both business entities located in Colombia.

The director denied the petition concluding 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 for failing to establish that an investment had been made 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, counsel to the petitioner asserts that the petitioner had submitted adequate evidence that a substantial United States investment had been made even though counsel's initial explanation of the documents establishing this fact may have been lacking. In support of the appeal, counsel submitted a brief and additional evidence.

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(1)(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 (1)(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.

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 first issue in this proceeding 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 that it intends to establish a business in the United States which will (1) export United States products to Colombia; (2) utilize United States professionals and experts to provide computer training seminars via video-conferencing to the foreign entity's facility in Colombia; and (3) establish a computer training facility in the United States. Other than a copy of a lease, articles of incorporation for the petitioner, occupational license, and a copy of a bank statement showing a balance of \$3,363.13, the petitioner submitted no evidence relevant to the organizational structure, scope, or goals of the United States entity. Moreover, the petitioner failed to submit any evidence regarding the size of the United States investment or the organizational structure of the foreign entity.

On February 7, 2005, the director requested substantial additional evidence regarding both the foreign entity and the United States entity including, *inter alia*, evidence of the size of the United States investment, an

organizational chart, evidence of ownership and control of the United States operation, and information regarding proposed staffing levels for the United States entity.

In response to the request for evidence, counsel to the petitioner explained the petitioner's business and staffing plan as follows:

[The petitioner] intends to hire one additional employee in the 1st Quarter 2005 for administrative help in finalizing contracts with vendors and enroll students into the proposed instructional courses. Additionally, [the petitioner] is considering sponsoring one of the parent's [sic] corporation's instructors in Colombia to design a curriculum and course in the Miami office. Given the success of their student enrollment, [the petitioner] will contract teachers to conduct the courses and as the market demands, expects to hire full-time teachers. This business plan worked in Colombia and is expected to work [in the United States]. Lastly, [the petitioner] is in a position to offer computer network and software support to both its international clients and local clients.

The petitioner also supplied an organizational chart for one of the foreign entities, Matriz, S.A., identifying the beneficiary as the president and placing him at the top of the organization.

Finally, in response to the director's request for evidence regarding capitalization of the United States entity, counsel to the petitioner explained that the beneficiary withdraws cash from the foreign entity's bank account via automatic teller machines (ATMs) in the United States, and provided evidence that the beneficiary withdrew \$300.00 via an ATM on February 1, 2005. Counsel further explained that the beneficiary withdraws money from his personal foreign account (into which the foreign entity deposits money), and that the petitioner borrowed approximately \$3,522.45 from a lender on January 12, 2005 to pay business expenses.

On February 17, 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 because the petitioner failed to establish that an investment had been made in the United States operation.

On appeal, counsel to the petitioner asserts that the petitioner had submitted adequate evidence that a substantial United States investment had been made even though counsel's initial explanation of the documents establishing this fact may have been lacking. In support of the appeal, counsel submitted a brief and additional evidence, including bank statements purporting to establish that the beneficiary actually has withdrawn approximately \$11,000.00 via ATMs from foreign bank accounts to capitalize the United States operation. These withdrawals occurred both before and after the filing of the current petition.

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

As a threshold matter, it must be noted that the bank statements and other evidence submitted on appeal by the petitioner to prove an investment in the United States operation will not be considered by the AAO in adjudicating this appeal. The petitioner was put on notice of the required evidence and given a reasonable

opportunity to provide it for the record before the visa petition was adjudicated. On February 7, 2005, the director specifically requested that the petitioner:

[s]ubmit evidence of the funding or capitalization of the United States company, such as copies of wire transfers showing transfers of funds from foreign organization, evidence of financial resources committed by the foreign company, copies of bank statements for checking/ [sic] and saving accounts, profit and loss statements o[r] other accountant's reports.

The petitioner failed to submit the requested evidence (other than the previously submitted bank statements and evidence of ATM withdrawals) and now attempts to supplement this response on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Moreover, because much of the evidence submitted on appeal concerns ATM withdrawals made after the filing of the petition on January 10, 2005, it would be of no evidentiary value in this matter even if considered. This is also the case for the receipts submitted in response to the director's request for evidence establishing that the beneficiary withdrew \$300.00 on February 1, 2005, and signed a promissory note for a business loan on January 12, 2005.¹ 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).

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

¹It should also be noted that, because the promissory note was not translated, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, for this additional reason, the evidence is not probative and will not be accorded any weight in this proceeding.

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.

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. The petitioner provided no information regarding an investment in the United States entity other than evidence that a bank account had been opened, and that it had a balance of \$3,363.13 on or about the day the petition was executed. Therefore, as of the date of the petition, the petitioner has failed to establish a sufficient investment in the United States operation which would permit the foreign entity to commence doing business in the United States.

Likewise, the petitioner failed to submit a business plan establishing 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. While the petitioner outlined the basic strategy of establishing a computer training facility in Florida and exporting materials to Colombia, the vague summaries provided by the petitioner and its counsel do not outline a credible plan, especially when coupled with the lack of evidence of any United States investment, for expansion beyond the initial start-up phase. Also, the petitioner failed to corroborate its plan, including financial goals and the scope of the entity, with any documentation, studies, or independent analyses. 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)).

Finally, the petitioner failed to provide sufficient evidence describing the organizational structure of the foreign entity. While the petitioner did provide an organizational chart, the information on this chart is inconsistent with the 2004 payroll records for the foreign entity. The chart shows the beneficiary supervising a general manager, who, in turn, supervises an operations manager. While is listed in the payroll records is not listed. Likewise, while the chart lists an assistant to this employee does not appear in the payroll records. The

petitioner makes no attempt to explain why the chart shows seven employees but the payroll records only account for five. 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). Therefore, the petitioner's description of the organizational structure of the foreign entity is insufficient.

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 for this reason the petition may not be approved.

Beyond the decision of the director, the petitioner did not establish that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In the initial petition, the petitioner provided a copy of a "Warehouse Lease" for 1,150 square feet of space dated November 16, 2004 as evidence that the petitioner had secured sufficient physical premises to house the proposed United States operation. However, paragraph 8(P) states that the petitioner "shall occupy the premises for **computer parts** and for no other purpose." Also, paragraph 5(J) indicates that the petitioner shall use the parking spaces directly in front of the leased premises. According to the photographs submitted on appeal, the number of parking spaces in front of the premises appears limited. Therefore, since the petitioner's business plan includes the operation of a computer training facility, the physical premises secured will not be sufficient. Not only does the lease fail to permit this use, but the physical surroundings are not compatible with the operation of a training facility. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner also failed to establish that the petitioner and the organization which employed the alien overseas are qualifying organizations as required by 8 C.F.R. § 214(l)(3)(i).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer (i.e., one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. In the current case, the petitioner alleges that the beneficiary owns a majority interest in, and controls, both the foreign employer and the petitioner. However, because the petitioner failed to establish the ownership and control of the petitioner, the petition may not be approved.

In the initial petition, the petitioner provided no evidence establishing ownership or control of the United States entity other than a copy of the articles of incorporation. On February 7, 2005, the director requested additional evidence establishing ownership and control of the petitioner. In response to the director's request for evidence, the petitioner provided a copy of the United States entity's bylaws, which identify the beneficiary in paragraph 1.2 as the owner of 54.5% of the petitioner's stock. However, the petitioner did not

provide a copy of any stock certificates or a stock register even though paragraphs 1.1 and 1.2 of the bylaws mandate their existence.

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 general evidence of a petitioner's claimed qualifying relationship, a copy of the corporation's bylaws alone is not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificates, and the minutes of relevant 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, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

Accordingly, the petitioner did not establish that the petitioner and the organization which employed the alien overseas are qualifying organizations as required by 8 C.F.R. § 214(l)(3)(i), and for this reason the petition may not be approved.

Beyond the decision of the director, according to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on September 16, 2005. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. *See Fla. Stat. 607.1421 (2006)*. Therefore, as this clearly and unequivocally renders the petitioner ineligible for the classification sought, the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary had been employed in a primarily managerial or executive capacity with the foreign entity for one year within the preceding three years.

Title 8 C.F.R. § 214.2(l)(3)(v)(B) requires that the petitioner prove that 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."

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify whether the beneficiary is claiming to have been primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to have been employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In the initial I-129 petition, the petitioner provided virtually no information regarding the beneficiary's duties with the foreign employer. While the petitioner repeatedly characterized the beneficiary as a manager of the foreign employer, his exact duties or job description were never disclosed. The employment attestation letters appended to the initial petition simply describe the beneficiary as "academic director" and "teacher" ([REDACTED])

S.A.) and as a "manager" [REDACTED]. Finally, the organizational chart, which is already of questionable evidentiary value given that it is inconsistent with the payroll records, fails to describe the duties of the subordinate employees. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Since the AAO will look first to the petitioner's description of the job duties when examining the executive or managerial capacity of the beneficiary, it is essential that the petitioner provide very specific information regarding the beneficiary's duties abroad. *See generally* 8 C.F.R. § 214.2(l)(3)(v). Therefore, given the lack of evidence, it is impossible for CIS to determine whether the beneficiary had been employed in an executive or managerial capacity overseas.

Accordingly, the petitioner did not establish that 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 as required by 8 C.F.R. § 214.2(l)(3)(v)(B), and for this reason the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied 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 is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.