

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

File: WAC 06 059 50576 Office: CALIFORNIA SERVICE CENTER Date:

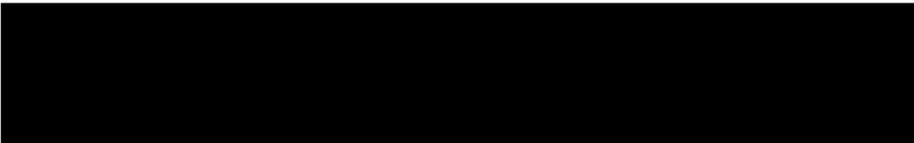
IN RE: Petitioner:
Beneficiary:



JUL 06 2007

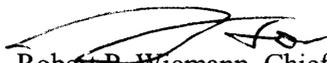
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to extend the temporary employment of the beneficiary as its president 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 in the state of Arizona, is engaged in resort marketing and real estate development. It claims to be the subsidiary of Elementz Interactive Communication Ltd., located in North Vancouver, British Columbia, Canada. The beneficiary was initially granted a one-year period of stay to open a new office and was subsequently granted two two-year extensions. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Counsel for the petitioner subsequently filed an appeal. On appeal, counsel for the petitioner asserts that the director erred by concluding that the beneficiary was not employed in a qualifying capacity. Specifically, counsel for the petitioner asserts that the director disregarded and misinterpreted evidence pertaining to the nature of the petitioner's organizational structure. In support of the appeal, counsel submits 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(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.

This primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

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.

With the initial petition, the petitioner explained that the petitioner was a 10% shareholder of Star Resort Group (SRG), and that together these companies continued their expansion into the resort industry. An organizational chart indicated that the petitioner, with the beneficiary as president, jointly oversaw a number of resort companies with SRG.

The petitioner also provided a list of employees, dated November 28, 2005. This document discussed the beneficiary's role in the organization and stated the following:

Currently, the beneficiary spends approximately 90% of his time with the ongoing business of the U.S. entity. Of that time, approximately 40% is spent in direct contact with clients and on the strategizing of marketing programs. 10% is spent on behalf of the client in the process of due diligence on the market validity of the projects. The balance of his time is spent managing the employees of SRG, of which [the petitioner] owns 10%.

The list also identified seven employees of SRG, namely, [redacted] Administrative Manager; [redacted] Accounting and Bookkeeping; [redacted] Marketing and Sales Administration; [redacted] Executive Vice President; [redacted] Vice President, Business Development; [redacted] President, Hospitality; and [redacted] Receptionist/Administrative Assistant.

On December 21, 2005, the director requested additional evidence with regard to the beneficiary's managerial and/or executive capacity. Specifically, the director requested a complete description of the beneficiary's duties, as well as an organizational chart showing the structure of the petitioner and the duties, position titles, and educational backgrounds of all employees, including the beneficiary. In a response dated March 15, 2006, the petitioner, through counsel, submitted a response to the director's request.

The organizational chart submitted indicated that the beneficiary was the president of the petitioner and the chief operating officer of SRG. The chart showed that he was supervised by two co-chairmen of SRG and that he directly oversaw four employees, namely [redacted], VP Sales; [redacted], EVP – Consulting; [redacted], Director of Administration; and [redacted] President, Hospitality Services.

A letter dated March 16, 2006 accompanied the response, and it stated that although the petitioner's ownership in SRG was currently being increased from 10% to 20%, the petitioning entity still operated as a separate company within leased space from SRG. The petitioner claimed that this joint relationship with SRG has been conducive to their business.

With regard to the beneficiary's duties and the amount of time he devoted to each, the petitioner stated:

[The beneficiary's] daily supervisory responsibilities are in concert with the co CEO's of SRG, [redacted] and [redacted]. In this role, he acts as COO/President and manages the daily activities of all key personnel. The resort marketing and sales industry requires adjustments in staff throughout the cycle of projects, yet there remains a core or key personnel that fall under the supervision of [the beneficiary], and are as listed on the enclosed organizational chart.

* * *

Currently, [the beneficiary] spends approximately 90% of his time with the ongoing business of the U.S. entity. Of that time, approximately 40% is spent in direct contact with clients and on the strategizing of marketing programs. 10% is spent on behalf of the client in the process of due diligence on the market validity of the projects. The balance of his time is spent managing the employees of SRG, of which [the petitioner] owns 20%.

Finally, Forms W-2 and W-3 were submitted by the petitioner for the years 2004 and 2005, showing that the beneficiary was the only person to receive wages from the petitioner during that period.

On March 31, 2006 the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be employed in a primarily managerial or executive capacity while in the United States. Specifically, the director concluded that the beneficiary appeared to be responsible for performing most of the duties essential to the operation of the business. The director noted that despite the claim that the beneficiary oversaw a subordinate staff, the record reflected that there were no other employees of the petitioner aside from the beneficiary. On appeal, counsel argues that the director ignored the repeated claims of its joint relationship with SRG, whereby the beneficiary, as its chief operating officer, oversaw a subordinate staff of professionals, who in turn oversaw additional personnel. Counsel also claims that by way of the management agreement between the petitioner and SRG, it is part of the beneficiary's job requirement to abide by the petitioner's contractual obligation to SRG to manage its personnel.

The AAO, upon review of the record of proceeding, concurs with the director's finding. Specifically, upon review of the beneficiary's stated duties and the current structure of the petitioner's enterprise, it appears that the petitioner has failed to establish that it will employ the beneficiary in a capacity that is primarily managerial.

The petition claims that the petitioner, an Arizona corporation, is engaged in resort marketing and real estate development. It claims to employ the beneficiary as its president. However, the evidence contained in the record is insufficient to establish that he is actually acting in a managerial or executive capacity.

While the beneficiary is the intended president of the company, there is insufficient evidence to show that he is acting primarily in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this case, the petitioner claims that 90% of the beneficiary's duties involve the U.S. entity, and that 40% of that time involves direct client contact. This is significant, since it suggests that the beneficiary is responsible for the marketing and sales of the petitioner, which are not traditionally managerial or executive duties. As a result, therefore, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Since this description of the beneficiary's duties, which includes both managerial and non-qualifying tasks, fails to quantify the exact amount of time the beneficiary spends on them, the AAO also cannot determine what an average day or week consists of for the beneficiary. In addition, the fact that no documentary evidence has been submitted to show that the petitioner actually employs its own staff indicates that there is no one to relieve the beneficiary from performing such non-qualifying tasks. As evidenced by the 2004 and 2005 tax documents, and by counsel's own admission on appeal, the beneficiary is the petitioner's sole employee. Hence, since the beneficiary appears to be the petitioner's sole employee, and since many of his identified duties are non-qualifying in nature, it appears that he is not employed in a primarily managerial or executive capacity. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel on appeal strenuously argues that this conclusion is erroneous. Specifically, counsel claims that by way of a management agreement, the petitioner is bound to manage SRG's personnel, thereby explaining the nature of the beneficiary's managerial capacity. According to the organizational chart, counsel argues, the beneficiary oversees a number of professional employees. This contention is unacceptable for two reasons. First, there is no evidence of any management agreement between the petitioner and SRG binding the beneficiary to supervise its staff. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Second, even if such an agreement existed, the petitioner has failed to explain how, after being incorporated for five years, its office is still functioning with the services of the beneficiary alone. The record indicates that the petitioner is still operating as an independent entity. While the AAO recognizes that based on its equity ownership interest in SRG it has a vested interest in being involved with the oversight of its staff and affairs, the relevant issue is the current status of the petitioning entity as its own corporation. 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 this case, however, the petitioner has been in existence since 2005, over five years from the time the instant petition was filed. In 2000, the beneficiary was granted a one-year period of stay to open the new office, which was subsequently extended for a total of four additional years. Therefore, a presumption exists that the U.S. entity should be sufficiently operational and established, thus obviating the need for a manager or executive to primarily engage in non-qualifying tasks such as marketing. Clearly this is not the case in the instant matter, as demonstrated by the beneficiary's hands-on duties and definitive obligation to perform all marketing, sales, and undoubtedly administrative and bookkeeping duties as well for the otherwise unstaffed petitioner. Despite the claimed affiliation between the petitioner and SRG, there is nothing in the record to suggest that SRG employees perform any duties at all for the petitioner. The AAO is therefore precluded from determining that the beneficiary will be employed in the United States in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions in this matter. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that Citizenship and Immigration Services (CIS) or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of

the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Beyond the decision of the director, the petitioner has also failed to establish that a qualifying relationship exists between itself and the Canadian entity. Although the petitioner claims to be a wholly-owned subsidiary of the foreign entity and submits a stock certificate supporting this contention, the record contains two obvious contradictions to this claim. First, the petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S). To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See* Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. Second, in multiple instances, the record contains claims that the beneficiary is the owner of the U.S. corporation. This is stated by the petitioner's accountant in his letter accompanying the Form 1120S, as well as in the November 28, 2005 letter from the petitioner.

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; *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, 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 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.

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of 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).

As a result of these unexplained and unresolved contradictions in the evidence of record, a qualifying relationship has not been established. For this additional reason, the petition may not be approved.

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.