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U.S. Citizenship
and Immigration
Services

D-7

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FILE: WAC 06 037 52040 Office: CALIFORNIA SERVICE CENTER Date: JUL 27 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office
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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 filed this nonimmigrant petition seeking to extend the employment of its director 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 California corporation, claims to be the subsidiary of Shopping Das Noivas, Ltda., located in Goias, Brazil.¹ The petitioner claims to be engaged in the cleaning of windows, skylights, and gutters. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and 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 petitioner and the foreign employer were not qualifying organizations as defined by the regulations.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision was erroneous and that, due to an error by the petitioner's accountant, erroneous evidence was in the record that suggested that a qualifying relationship did not exist between the parties. In support of this contention, 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)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

¹ On Form I-129, the petitioner listed the foreign entity as "Bridal Shop." Further review of the record indicates that this name was a loose translation of the actual name of the foreign employer, Shopping Das Noivas, Ltda.

- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the petitioner and the foreign organization are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (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
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity, or
 - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting

services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner initially claimed, on the L Supplement to Form I-129, that the U.S. entity was a branch of the Brazilian entity, which was identified as "Bridal Shop." Also on Form I-129, the petitioner claimed that 60% of the stocks of the foreign entity were held by those who owned 60% of the U.S. entity, thereby simultaneously suggesting an affiliate relationship. The petitioner submitted a copy of its 2005 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, which shows that the beneficiary owns a 34% interest in the U.S. company, while two other individuals, [REDACTED] and [REDACTED] each own 33% of the petitioner's stock. The petitioner did not submit evidence of ownership of the foreign company.

The director found that the initial evidence was confusing and inconsistent, and consequently issued a request for evidence on February 28, 2006. In the request, the director specifically required the petitioner to submit evidence that definitively established its qualifying relationship with the Brazilian company. Requested documents included but were not limited to annual reports, corporate ledgers, stock certificates, articles of incorporation and proof of stock purchase. The director also noted that on Schedule L, Line 22 of the petitioner's 2005 IRS Form 1120S, U.S. Income Tax Return for an S Corporation, a significant increase in the petitioner's capital stock was indicated. An explanation with regard to its affect on the petitioner's ownership and stock interests was thereby requested.

The petitioner responded on March 22, 2006. The petitioner submitted a document entitled "Contrato Social," which was not translated from the Portuguese language. The petitioner also submitted three share certificates for the petitioner dated May 4, 2004, showing that the beneficiary and [REDACTED] each owned 990 shares of the petitioner, whereas [REDACTED] owned 1020 shares. The petitioner also submitted copies of cancelled checks as evidence of payment for these shares, in addition to a letter dated March 20, 2006 from its accounting firm, which explained that the increase in the petitioner's capital stock from \$22,800 to \$69,155 would not affect the ownership of the company. Furthermore, the petitioner submitted IRS Form 2553, Election by a Small Business Corporation, which indicated that as of the tax year ending December 31, 2004, the petitioner's ownership was as follows:

[REDACTED]	333.33
[REDACTED]	333.33
[REDACTED]	333.34

No evidence of the ownership of the foreign entity was submitted.

Upon review of the evidence submitted, the director concluded that the record was devoid of evidence to establish that the entities maintained a qualifying relationship. The director cited these deficiencies, and cited the petitioner's failure to provide the requested evidence needed to properly examine the relationship between the two entities. The director subsequently concluded that the petitioner's claim of affiliation with the foreign entity was invalid, and as a result, the petition was denied on April 3, 2006.

The petitioner appealed the decision, asserting that at the time of filing, two of the petitioner's three shareholders shared 50/50 ownership of the foreign entity and owned a majority of the petitioner. In addition, counsel claimed that by virtue of newly-submitted proxy agreements, ██████████ controlled the petitioner. Counsel concluded, therefore, that this evidence combined established common ownership and control and thereby satisfied the regulatory requirements. Finally, counsel also relies on the fact that an accounting error led to the discrepancies in the record, but failed to assert what information was incorrect.

As cited by counsel on appeal, 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 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*, 19 I&N Dec. at 595.

In this case, the petitioner has provided an abundance of conflicting evidence that renders it difficult to determine which documentation is correct. 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See e.g. Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The first problem was that the petitioner claimed to be a branch of the foreign entity. This contention can easily be disposed of. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). Citizenship and Immigration Services (CIS) has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent

company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

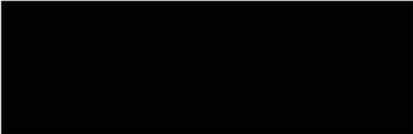
Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

With the petition, the petitioner's U.S. Income Tax Return for an S Corporation was submitted, showing that the petitioner had incorporated in the United States on May 10, 2004. As a result, therefore, there is no dispute that the petitioner does not qualify as a branch of the foreign entity.

It is also clear that the petitioner is not a subsidiary of the foreign entity. 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 and, therefore, would be an affiliate of the foreign entity.

The initial evidence submitted to establish its affiliation with the foreign entity was, as previously noted, inconsistent. Form I-129 claimed that "60% of stocks in the foreign company are held by those who hold 60% in the U.S. company." However, the petitioner's Form 1120S for 2005 indicated, on its attached Schedules K-1, Shareholder's Share of Income, Deductions, Credits, etc., that the petitioner was owned as follows:

	33%
	33%
	34%

Even if the shares of two of the three persons listed above were added together, they would not total 60%. Another discrepancy in the record was an unexplained increase in the petitioner's capital stock, as set forth of

the 1120S, from \$22,800 to \$69,155 in 2005. The director requested an explanation with regard to this, along with definitive evidence of the qualifying relationship between the parties, in the request for evidence.

The response to the director's request created more confusion. The petitioner submitted three share certificates for the U.S. entity, dated May 4, 2004, which broke down the petitioner's ownership as follows:

████████████████████	990 shares (33%)
████████████████████	1020 shares (34%)
████████████████████	990 shares (33%)

Additionally, the petitioner's IRS Form 2553 indicated that a total of 1,000 shares had been issued, which directly contradicted the above-reference share certificates, which claim a total of 3,000 shares were outstanding. No explanation was provided to explain the discrepancies regarding the percentage of ownership and the number of shares actually issued. As noted above, the Form 1120S indicated that the beneficiary owned 34% of the petitioner, whereas the share certificates indicated that ██████████ owned 34%. 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).

On appeal, the petitioner submitted a translated copy of the foreign entity's Articles of Association, which demonstrated that ██████████ and ██████████ each own 50% of the foreign entity. In addition, counsel provides copies of voting proxy agreements signed by the beneficiary and ██████████ on May 30, 2004, which grant ██████████ proxy powers over their respective 33% interests in the petitioner.

While a review of the foreign entity's Articles of Association appears to establish that ██████████ and ██████████ own equal shares of the foreign entity, the question of ownership and control of the U.S. entity has not been resolved. On appeal, counsel asserts that at the time of filing, 67% of the shares of the U.S. entity were owned by ██████████ and ██████████ and concludes that, as a result, the same owners own and control a majority interest in both entities.

In this matter, however, there are simply too many contradictions in the record to determine the true nature of the ownership of the U.S. entity. First, the initial claim of the petitioner was that ██████████ and ██████████ owned 60% of the petitioner. However, the K-1 Schedules submitted with the initial petition suggested that ██████████ and ██████████ owned a combined interest of 66% in the petitioner. In response to the request for evidence, share certificates were submitted, substantiating the claim that ██████████ and ██████████ owned a combined interest of 33%, by way of their respective share interests of 990 and the beneficiary's 1020 shares. It is noted that according to the stock certificates, a total of 3000 shares was outstanding. The petitioner's IRS Form 2553, however, presented a completely different overview. This form, for the tax year ending December 31, 2004, indicated that only 1,000 shares had been issued, and that the breakdown of shares was 333.33, 333.33, and 333.34.

Despite the questions raised by these inconsistencies, the most important question is whether ownership of these shares was actually acquired. The petitioner presented evidence of cancelled checks from the three shareholders in the amounts of \$990, \$990 and \$1020, respectively. However, Line 22 of Schedule L on the petitioner's 2004 tax return indicate that a total of \$22,800 in capital stock was outstanding.

On appeal, counsel acknowledges that although the stocks were subscribed at the time of filing, they were not paid for in full. Counsel claims that full payment has since been made, and submits copies of deposit records from Citibank, showing three deposits totaling \$18,200 into an unidentified checking account over the course of 2006. This evidence is insufficient for two reasons. First, the copies of the deposit transactions do not identify the owner of the account into which the funds were received, nor do they identify from where the funds originated. As a result, there is no evidence to support a finding that these funds represent payment from the shareholders for their stock interests. Second, and most importantly, The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Merely submitting copies of share certificates, identifying the alleged owners of those shares, is insufficient to establish ownership without evidence that payment was rendered for that interest. In this matter, therefore, the petitioner has failed to establish the crucial element of ownership.

Furthermore, the submission of the proxy agreements, for the first time on appeal, is likewise insufficient and creates further inconsistencies. Specifically, the documents indicate that the beneficiary and [REDACTED] both signed over their respective 33% interests to [REDACTED] shortly after the petitioner's incorporation. The initial evidence submitted to establish the petitioner's affiliation with the foreign entity, however, contradicts these agreements. For example, the petitioner's Form 1120S for 2005 indicated on its Schedules K-1, that the beneficiary owned 34% of the petitioner, not 33% as claimed in the voting proxy. Furthermore, the petitioner claimed on Form I-129 that "60% of stocks in the foreign company are held by those who hold 60% in the U.S. company." Since the proxy agreements, dated May 30, 2004, precede the filing of the petitioner's Form I-129 and Form 1120S, little evidentiary weight can be given to these documents. Again, 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. at 591-92.

Therefore, based on the petitioner's failure to provide substantiated evidence of the ownership of the petitioner, coupled with the blatant contradictions with regard to the exact percentages of ownership claimed by its shareholders, it cannot be determined that a qualifying relationship exists between the two organizations. The record does not contain persuasive evidence that that two entities were owned and controlled by the same parent or individual, or owned and controlled by the same group of individuals who own approximately the same amount of shares in each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(L). 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). In addition, if CIS fails to believe that a fact stated in the petition is true, CIS may

reject that fact. *See e.g. Anetekhai v. I.N.S.*, 876 F.2d at 1220; *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. at 10; *Systronics Corp. v. INS*, 153 F. Supp. 2d at 15.

Despite counsel's assertions on appeal, the conflicting evidence in the record has not been adequately explained, and counsel's assertions are simply insufficient to establish eligibility in this matter. 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).

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.