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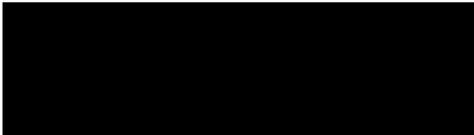


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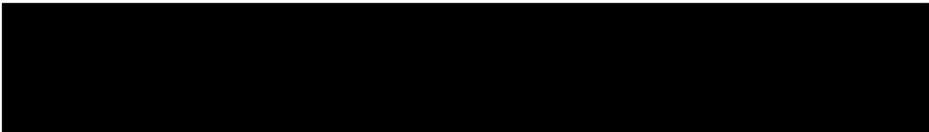


FILE: LIN 05 139 52520 Office: NEBRASKA SERVICE CENTER Date:

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

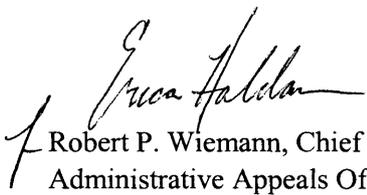
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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

DISCUSSION: The Director, Nebraska 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 president 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 Oregon, claims to be the subsidiary of [REDACTED] located in Khabarousk, Russia. The petitioner identifies itself as an importer and distributor of stereo headsets. 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 three years.

The director denied the petition concluding that the petitioner did not establish that (1) a qualifying relationship existed between the petitioner and a foreign organization; (2) the petitioner had been doing business during the previous year; or (3) the beneficiary will be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel for the petitioner contends that the director erroneously denied the petition and in support of this assertion 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.

In addition, 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;
- (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 first basis for the denial in this matter is the question of 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.

On the L Supplement to Form I-129, the petitioner claimed that the U.S. entity was the subsidiary of the foreign entity. Specifically, the petitioner indicated that the foreign entity owned 52% of the petitioner, and that that the beneficiary and [REDACTED] each owned 24% of the petitioner. No additional documentation was submitted. Consequently, the director issued a request for evidence on September 28, 2005, which specifically requested that the petitioner submit evidence, in the form of stock certificates, stock ledgers, and other corporate documentation to substantiate the petitioner's claim that a qualifying relationship existed.

In a response dated December 20, 2005, the petitioner, through counsel, addressed the director's request. Included in the response was a letter from the president of the foreign entity dated December 12, 2005, which stated that [REDACTED] still owned 51% of the petitioner. Also submitted were three stock certificates, which demonstrated the following ownership distribution of the petitioner:

[REDACTED]	52%
[REDACTED]	24%
[REDACTED]	24%

The director subsequently denied the petition on the basis that the record contained conflicting evidence regarding the ownership of the petitioner. On appeal, counsel submits additional documentation in support of the claim that the foreign entity owns 52% of the petitioner and thus is the majority owner. On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that a qualifying relationship existed between the petitioner and the foreign 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.

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, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

In the petition, the petitioner claimed that the foreign entity, [REDACTED] owned 52% of the petitioner and, therefore, the petitioner was its subsidiary since it was the majority owner. In response to the director's request to submit additional evidence in support of the claim, the petitioner submitted: (1) a letter from the foreign entity, referring to itself as [REDACTED] claiming that it still owned 51% of the petitioner; and (2) a stock certificate showing [REDACTED] president of the foreign entity, owned 52% of the petitioner.

There are several problems as a result of this documentation. First, the petitioner has not clarified the actual name of the foreign entity, since it initially referred to it as [REDACTED], yet in response to the request for

evidence, it is referred to as [REDACTED]. Second, the foreign entity's letter dated December 12, 2005 claims that the foreign entity owns 51% of the petitioner, not 52% as it originally claimed. Finally, stock certificate number 1 issued 52 shares of the petitioner to Alexander Ryjov, an individual, and not to the foreign entity.

On appeal, the petitioner submits additional corporate documentation in support of the claimed parent-subsidary relationship. However, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit additional corporate documentation, as requested, and now submits it 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.¹

The petitioner relies on the fact that 52% of the petitioner's shares are issued to the foreign entity's president, Alexander Ryjov, as evidence that the foreign entity owns the petitioner. The petitioner, however, overlooks the fact that a corporation is a separate and distinct legal entity from its owners or stockholders. *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). While Alexander Ryjov may in fact be the president and owner of the foreign entity, the foreign entity itself is not the owner of the petitioner. Since the petitioner has submitted no documentation with regard to the ownership of the foreign entity, the AAO is unable to evaluate the record to determine if an affiliate relationship exists by virtue of Mr. Ryjov's majority ownership of both entities. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

It is evident, therefore, that the foreign corporate entity is not the majority owner of the petitioner, and thus a parent-subsidary relationship does not exist. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K) (defining "subsidiary"). In addition, there is insufficient evidence in the record to determine whether an affiliation, in the alternative, exists between the two entities. Moreover, the conflicting evidence in the record, including different corporate names for the foreign entity, different percentages of ownership claimed, and a stock certificate issued to an individual rather than the foreign corporate entity, cast doubt upon the validity of the petitioner's claims overall. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent

¹ It is noted that the petitioner submitted a copy of a U.S. Income Tax Return for an S Corporation (Form 1120S) for 2004. Although a statement attached to the petitioner's U.S. Income Tax Return (Form 1120) for 2005 clarifies that the petitioner did not qualify as an S Corporation in 2004 and that its filing of Form 1120S was in error, the fact remains that inconsistent information is contained in the record. For example, the accompanying Schedules K-1 for the petitioner's 2004 return indicates that the beneficiary and [REDACTED] each own 50% of the petitioner, and there is no mention of the foreign corporation or [REDACTED]. On Schedule K accompanying the 2005 return, the petitioner indicates that a foreign person owns 48% of the petitioner. Form 5472, entitled Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business, indicates that [REDACTED] is the 25% foreign shareholder. These claims directly contradict each other, and further contradict the claim that the beneficiary and [REDACTED] each own twenty-four shares of the petitioner. This conflicting information has not been resolved.

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. *Id.* at 591. Furthermore, 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).

Based on the discrepancies noted above, it cannot be concluded that a qualifying relationship exists between the parties. For this reason, the appeal will be dismissed.

The second issue in this matter is whether the petitioner has been doing business for the previous year as required by the regulations. The regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

In this matter, the petitioner claims that it is engaged in website development, particularly three dimensional imaging, and importation and distribution of stereo headsets. In a letter of support dated December 4, 2005, counsel explained that several of the petitioner's initial business transactions failed, and as a result, the petitioner required additional time to recoup its investment and reach its goals. With the petition, minimal evidence of the petitioner's business practices was submitted. For example, the petitioner submitted a Consulting Agreement and several Letters of Intent, demonstrating agreements to form long-term cooperative business relationships with other companies, which were entered into in March 2005. Additionally, the petitioner submitted several invoices showing the purchase of stereo headphones from late December 2004 and January 2005. The beneficiary was granted L-1A status on April 4, 2004.

Consequently, in the request for evidence issued on September 28, 2005, the director requested documentation establishing that the petitioner had been doing business during the previous year as required by the regulations. In the response filed on December 20, 2005, the petitioner submitted a client list which showed the various companies with which it had formed contractual relationships. In addition, several other invoices were submitted which showed the purchase of stereo headphones for August, September, and November 2005.

The director denied the petition on the basis that the evidence in the record failed to show that petitioner had satisfied the regulatory requirements for doing business. On appeal, counsel for the petitioner submits the petitioner's 2005 tax return in support of the contention that the petitioner has been doing significant business.

On review of the evidence submitted, the AAO concurs with the director's finding. The record contains copies of invoices for the purchase and import of stereo headphones; however, the first invoice is from December 29, 2004. Furthermore, although it appears that the petitioner entered into contractual agreements with various companies in March 2005, none of these contracts, according to its client list, has yet been satisfied. The record, therefore, contains no documentation with regard to the petitioner's business dealings from April 4, 2004 until December 29, 2004, nor has the petitioner provided an explanation in this regard.

The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business," as stated above, is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In the instant matter, while the AAO acknowledges the petitioner's claim that business transactions were not as successful as they had expected for the first year, the relevant period to examine is April 2004 to April 2005. While the petitioner on appeal submits its 2005 tax return as evidence that its business dealings have become more expansive, the fact remains that the record contains insufficient evidence that the petitioner was conducting business consistently from April 2004 to April 2005. 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).

The record, therefore, contains insufficient evidence that the petitioner was doing business as required by the regulations in the twelve months from the date of approval until the date of the extension request. While evidence is submitted to show that goods were acquired in January 2005 and contracts were executed in March 2005, there is no evidence or documentation regarding the petitioner's business dealings from April 2004 through December 2004. For this additional reason, the appeal will be dismissed.

The final issue in the present 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 provided no details regarding the beneficiary's duties as president of the United States company. In the request for evidence, therefore, the director requested additional evidence regarding the beneficiary's duties and the staffing of the organization. In response, the petitioner provided the following overview of the beneficiary's duties:

- [O]rganization of the wholesale component development;
- [C]onducting negotiations with the top-managers of the client companies and partners;
- [S]upervising and control of projects implementation;
- Hiring and firing of the personnel for [the petitioner] and subcontracting companies to perform duties in the wholesale component of our business;
- Conducting negotiations and securing strategic alliances with the companies in this market segment[.]

The petitioner also submitted a statement explaining that the petitioner was run by two executive employees: the beneficiary and [REDACTED], the vice-president. It further explained that other services, including accounting, insurance, market research, and warehousing and distribution were handled by four different companies as subcontractors. Despite the director's request for copies of the petitioner's quarterly tax returns, this evidence was not submitted.

The director denied the petition based on a finding that the beneficiary would be engaged in most of the day-to-day activities of the business. Specifically, the director concluded that based on the vague description of duties and the lack of evidence showing wages paid to employees, the beneficiary must be responsible for

the ordinary tasks associated with the operation of the business. On appeal, counsel for the petitioner contends that the director's conclusions are erroneous and provides several arguments in support of this position.

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). The definitions of executive and managerial capacity have two separate requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The description of duties provided is basic and fails to adequately describe the true nature of the beneficiary's day-to-day duties. It remains unclear, therefore, exactly what the beneficiary will do on an average work day. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Additionally, the petitioner relied on the claim that the beneficiary and the vice-president are both executive employees, and independent companies, as subcontractors, execute the critical daily tasks associated with the petitioner's enterprise. The director concluded that, despite the claim that contractors perform most of the required labor, the lack of subordinate staff to relieve the beneficiary clearly demonstrated that he was performing non-qualifying tasks. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a one-year-old company that claimed to be engaged in both web design and import and distribution of stereo headphones. The petitioner claimed to have a projected gross income of \$455,000 for 2005, but the 2004 tax return submitted showed a gross income of merely \$22,125. It is also noted that the return showed no money paid in salaries or as compensation for labor, thereby weakening the petitioner's claim that various contractors performed the necessary tasks of the business. The petitioner claimed to employ four companies as subcontractors in addition to a vice-president, yet no evidence of these employment relationships was submitted. The petitioner, therefore, submitted insufficient evidence to establish that sufficient staff existed to relieve him from having to primarily perform the actual day-to-day, non-managerial operations of the company. 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)). Although additional documentation is provided on appeal to overcome the director's conclusions, insufficient evidence was submitted prior to the director's decision based on the record. The evidence prior to adjudication, therefore, clearly indicates that a solid organizational structure, with the beneficiary at the top of

the hierarchy, was not in effect at the time the extension was filed, such that the AAO could find the petitioner had reached the level that it could support a primarily managerial or executive position.

In the present matter, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require Citizenship and Immigration Services (CIS) to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

For the reasons set forth above, it cannot be found that the beneficiary is performing primarily managerial or executive duties. For this additional reason, the appeal will be dismissed.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.