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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 02 001 53745 Office: VERMONT SERVICE CENTER Date: MAR 15 2004

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner [redacted] endeavors to classify the beneficiary as an executive 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 is a subsidiary of Flori-Bak Ltd. located in Nigeria and is engaged in the construction business. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's president. The petitioner was incorporated in the State of Massachusetts in May 2000 and claims to have one employee.

On June 28, 2002, the director denied the petition because the beneficiary will not serve in a primarily executive capacity and the U.S. entity has not been doing business. The director noted that the record contains evidence of a B-2 extension of stay from December 27, 1999 until June 6, 2000 and found that, since the first petition was filed on June 12, 2000, "the beneficiary was not in legal immigration status at the time of filling and was not eligible for an extension."

On appeal, the petitioner states that the beneficiary is employed in an executive capacity and actively negotiates contracts. Also, the petitioner refutes the director's findings that the beneficiary was not in legal status at the time of filing. Counsel claims that the original petition was filed before the expiration of the beneficiary's B-2 visa.

The AAO concurs with counsel's assertion that the original petition was filed before the expiration of the beneficiary's B-2 visa. The petitioner submitted a copy of the beneficiary's approval notice for the extension of the B-2 visa indicating that the expiration date was June 26, 2000 rather than June 6, 2000. Therefore, the AAO withdraws the director's finding that the beneficiary was not in legal immigration status when the petition was filed.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) 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 issue in this proceeding is whether the beneficiary will be primarily performing executive duties for the United States entity. The petitioner makes no claim that the beneficiary will be performing managerial duties.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means 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.

On October 1, 2001 the petitioner filed Form I-129. The Form I-129 stated that the beneficiary will be the remote managing director of the foreign entity through "telephone and e-mail interface with the Acting Managing Director in Nigeria." Specifically, the beneficiary's duties will include supervising the purchase of all materials, reviewing all technical drawings with the site manager, meeting with employees regarding new contract negotiations, negotiating and executing all contracts, and being in charge of financial matters. The beneficiary also plans to negotiate and develop one or more joint ventures with U.S. construction firms to obtain U.S. technology for Nigerian projects.

Additionally, the petitioner claimed that the beneficiary is an executive who maintains a business in his home and described his U.S. duties in a September 21, 2001 supporting letter as:

> [The beneficiary] is negotiating and executing contracts for and on behalf of [the U.S. and foreign entities]. In addition to his attempts and negotiations to set up a joint venture with a US construction company and a ceramics company to manufacture construction tile, [the beneficiary] has been directly involved in the management of the Flor-Bak. Co. Ltd operations in Nigeria through his managers in Nigeria.

Although the petitioner submitted a description of the beneficiary's duties, the director requested that the petitioner submit additional evidence to assist in determining whether the beneficiary will be employed in a primarily executive capacity. In particular, the director requested that the petitioner submit evidence of the number of any contractors or employees utilized and their duties, copies of quarterly tax returns, and the management and personnel structures of the U.S. company.

In response to the request for additional evidence, the petitioner submitted a letter dated November 9, 2001 and signed by the beneficiary. The beneficiary stated that he was the only U.S. employee. Furthermore, the letter asserted that the beneficiary "came to the United States in order to set up several joint ventures with US construction companies to assist [the foreign entity], to obtain the technology and equipment necessary to give [the foreign entity] a competitive edge in Nigeria."

On June 28, 2002, the director denied the petition and determined that the proposed duties did not establish that the beneficiary will be primarily serving duties in an executive capacity.

On appeal, counsel states that the beneficiary acts in a primarily executive capacity. Counsel claims that the beneficiary is "involved in the negotiation of contracts, directed the entire operation of the organization, established the goals and policies of the organization, exercised sole discretionary decision making and received no supervision from higher level executives."

In 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). On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to establish what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "establishing goals and policies" and "supervising the purchasing

of all materials." The petitioner did not, however, define the beneficiary's goals, policies, or clarify who actually purchases the materials. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as "directing the entire operation of the organization, establishing goals and policies of the organization, and exercising sole discretionary decision making." However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In addition, the petitioner describes the beneficiary as being involved in the negotiating process of setting up prospective joint ventures with U.S. companies. Since the beneficiary actually negotiates the contracts, he is performing a task necessary to provide a service or product. 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).

After careful consideration of the evidence, the AAO concludes that the beneficiary will not be employed primarily in a qualifying executive capacity. For this reason, the petition may not be approved.

The AAO now turns to the second issue of whether the petitioning entity is doing business in the United States as required by 8 C.F.R. § 214.2(l)(1)(ii)(H).

The regulations at 8 C.F.R. §§ 214.2(l)(1)(ii)(F) and (H) state:

> (F) New office means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.
>
> (H) Doing business means 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 the September 21, 2001 letter, the petitioner stated it submitted evidence that the beneficiary "has been involved in an attempt to set up joint ventures with U.S. construction companies" and has "set up a joint venture for the manufacture and wholesale distribution of construction tiles made from Nigerian clay. He is now in the process of developing the slip formula with a US ceramics company." The petitioner also claimed that the beneficiary "has been involved in the continuous course of business to attempt to secure one or more joint ventures with U.S. construction companies." Finally, an August 31, 2001 affidavit signed by the beneficiary stated:

"For the past year I have been attempting to set up joint ventures with companies with advanced construction who would be willing to share their technology for the improvement of the manufacture and installation of water supply systems."

In the request for evidence, the director requested a letter from the foreign company's general manager. Also, the director requested an affidavit explaining the clay sample and whether the foreign entity contracted with a customs broker regarding the order of clay. The director also requested information concerning the U.S. entity's gross and net annual incomes.

In response, the petitioner submitted a letter dated January 16, 2001 stating that the U.S. entity's operations are not income producing. In addition, the petitioner submitted an affidavit, dated November 9, 2001 and signed by the beneficiary, stating:

> Since I have been in the United States I have not found many companies willing to form joint ventures in the construction field. . . . I shifted my attention to the possibility of manufacturing clay construction tiles made from Nigerian clay. I had some clay sent to me. It did not go through customs. It was approximately 100 grams. It was sent in a large envelope and went through regular post. I did not have a broker because of the small amount of clay which had been sent.

The beneficiary also stated in a November 9, 2001 letter that he has formed one joint venture with Creative Touch Studios; however, the letter also stated that Creative Touch Studios, which has been working with the beneficiary to develop the manufacturing process and equipment for the clay construction tiles, has not been paid because it is in "a joint venture already."

In his decision, the director determined that the U.S. entity is not doing business as defined in 8 C.F.R. § 214.2(l)(1)(ii)(H).

On appeal, counsel claims that the beneficiary is not a mere agent and is actively involved in negotiations and setting up joint ventures; therefore, counsel's position is that the U.S. entity is doing business.

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 regulation 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. 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, the petitioner has submitted no evidence that the U.S. entity has been doing business. According to the petitioner's year 2000 U.S. Income Tax Return Form 1120S, the U.S. entity has not produced any income. In addition, petitioner claims that the beneficiary "has been involved in the continuous course of business to attempt to secure one or more joint ventures with U.S. construction companies." Since there is no evidence in the record of contracts between the petitioner and other U.S. companies to perform the jobs, it is apparent that the U.S. entity has not generated any business for the previous year. The petitioner is not granted additional time beyond this one year period to investigate new

business ventures in an attempt to qualify for L-1 status. Although the beneficiary claims it has not found many companies willing to form joint ventures in the construction field and has shifted his attention to the possibility of manufacturing clay construction tiles made from Nigerian clay, the petitioner must establish eligibility at the time of filing for the extension. 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). Therefore, the AAO concludes that there is a lack of evidence to establish that the U.S. entity has been doing business as defined by 8 C.F.R. § 214.2(l)(1)(ii)(H).

The AAO notes that the beneficiary claims he has formed a joint venture with Creative Touch Studios. Although the petitioner submitted a May 28, 2001 letter from Creative Touch Studios, there is no proof in the record to document the existence of the claimed joint venture. As previously stated, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* In sum, the lack of evidence of a joint venture again shows that the petitioner is not doing business.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the Nigerian entity for at least two reasons. First, the petitioner claims that it is a wholly-owned subsidiary of the foreign entity. The petitioner submitted a copy of a 2000 U.S. Income Tax Return Form 1120S for an S Corporation. 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 non-resident alien 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, it appears that the U.S. entity is owned by at least one individual residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Second, there is insufficient documentation to demonstrate a qualifying relationship. The regulations 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, supra*; *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 International, supra.*

As general evidence, articles of incorporation alone are insufficient to demonstrate whether a stockholder maintains ownership and control of a corporate entity. The record contains no evidence such as a corporate stock certificate ledger, stock certificate registry, and the minutes of

relevant annual shareholder meetings to determine the total number of shares issued, the exact number issued to the shareholders, and the subsequent percentage ownership and its effect on corporate control. There is also no documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. In sum, the AAO concludes that the petitioner has failed to establish that a qualifying relationship exists between the petitioner and foreign entity as required by 8 C.F.R. § 214.2(l)(G)(1).

The AAO notes that there is a discrepancy in the record concerning Mr. [redacted] November 9, 2001 letter. The letter, signed by Mr [redacted] states that he is the general manager of the foreign entity and that the beneficiary owns 60 percent of the company. However, counsel, on Form I-129 and in a September 21, 2001 supporting letter, claims that the beneficiary is the president and general manager of the U.S. and foreign companies and owns 50 percent of the company's stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence and failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho, supra.*

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.