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U.S. Citizenship and Immigration Services

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[redacted]

File: SRC 04 240 50133 Office: TEXAS SERVICE CENTER Date: MAY 04 2006

IN RE: Petitioner:
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:

[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, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary 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 is a limited liability company organized in the State of Texas that intends to engage in property investment and management. The petitioner claims that it is the affiliate or subsidiary of Wigatap Trade and Investment Limited, located in Lagos, Nigeria. The petitioner seeks to employ the beneficiary as vice-president and chief operating officer of its new office in the United States for a three-year period.

The director denied the petition concluding that the petitioner did not establish the existence of a qualifying relationship between the United States entity and the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the U.S. entity qualifies as both an affiliate and subsidiary of the foreign entity. Counsel submits a brief and new evidence in support of the appeal.

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.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue in the present proceeding is whether the petitioner established that the beneficiary's foreign employer and the U.S. entity have a qualifying relationship as required by 8 C.F.R. § 214.2(l)(3)(i).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means 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[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(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.

The nonimmigrant petition was filed on September 10, 2004. On the L classification supplement to Form I-129, the petitioner stated that the U.S. company is a subsidiary of the company abroad and described the ownership of each company as follows:

[Foreign entity]:
1. [redacted] 100,000 shares
2. [redacted] 350,000 shares
3. [redacted] 50,000 shares
4. [redacted] 100,000 shares
5. [redacted] 50,000 shares

[U.S. entity] Members:
1. [redacted]
2.
3.
4.

The petitioner submitted its articles of organization, which identify the beneficiary, [redacted] as managers of the limited liability company. The articles of organization do not identify the membership of the organization or indicate the number of membership units authorized by the company.

The petitioner also provided a copy of the foreign entity's registration indicating that the entity is authorized to issue 900,000 shares. The document provides the following information regarding share issuance:

[redacted] 100,000 shares
– 320,000 shares
– 100,000 shares
250,000 shares
50,000 shares

The director issued a request for evidence on September 23, 2004, instructing the petitioner to submit: (1) evidence that a money transfer has taken place to fund the start-up of the U.S. company; (2) a copy of all pages of the company's articles of incorporation; and (3) copies of stock certificates showing who owns the U.S. company.

In a response dated October 6, 2004, the petitioner re-submitted its articles of organization, noting that the document is only two pages long. Counsel for the petitioner noted that as a limited liability company, the owners hold membership certificates rather than stock certificates, and stated that "the owners of [the petitioner] are the owners of [the foreign entity]. The petitioner submitted a total of seven membership certificates, all of which are dated June 10, 2004. The membership certificates indicate on their face that the company is authorized to issue 1,000,000 membership units with a par value of $1.00 per unit. None of the submitted certificates indicate the number of units issued to each member. The petitioner provided copies of the following certificates:

Certificate Number	Name
2	[redacted]
3	
4	
5	
6	
19	
20	

The petitioner submitted evidence that the foreign entity transferred $25,000 to the petitioner's bank account on July 28, 2004.

The director denied the petition on October 21, 2004, concluding that the petitioner had not established that the U.S. company has a qualifying relationship with the foreign entity. The director noted that the petitioner had provided inconsistent evidence regarding the ownership of the U.S. entity and observed that the submitted membership certificates did not identify the number of shares or membership units held by each member. The director concluded that the petitioner had failed to establish that the U.S. entity is a subsidiary of the foreign entity, and failed to establish that the two entities are affiliates based on common ownership and control by an individual or group of individuals.

On appeal, counsel for the petitioner asserts that the U.S. entity is both a subsidiary and an affiliate of the foreign entity. Counsel asserts that the U.S. company is owned by the following members in the following proportions:

1)	[redacted]	10%
2)		10%
3)		10%
4)		4%
5)		51%
6)		5%
7)		10%

Counsel states:

> It is clear from the above that all of the . . .shares of the foreign company are owned by members and owners of the U.S. Company. In addition, the foreign company is also an owner and member of the U.S. Company. Thus, of the seven members of the U.S. Company, five are owners of the foreign company while a sixth member is the foreign company itself. Accordingly, there is a near unanimity of ownership between the foreign and U.S. Company. The service states however that the percentage or proportion shareholding in the U.S. Company was not stated in the response to its request for evidence. However, this omission flows directly from the nature of the U.S. Company as a Limited Liability Company. . . . Unlike a corporation, an LLC's organizing article does not require the delineation of members' interest in the company. Members' interest is usually provided for in less informal arrangements, such was [the petitioner's case]. The same individuals that own the entire foreign corporation also own the U.S. Company. In addition, the foreign company owns 51% of the U.S. Company. Thus 96% of the U.S. Company is owned by both the same owners of the foreign company and foreign company itself. Accordingly we submit. . .the same owners of the foreign company own more than 50% of the U.S. company and therefore meets the statutory definition of a subsidiary of the foreign company.

Counsel further contends that the petitioner and the foreign entity are affiliates since "virtually the same individuals own both companies." Counsel asserts that the ownership structure "sufficiently demonstrates that the foreign company has control of the U.S. Company and therefore meets the statutory requirements of an affiliate of the foreign company."

In support of the appeal, the petitioner submits a "Pre-Organization Agreement" for the U.S. entity, dated May 12, 2004. The agreement indicates at clause seven:

> The [members] shall pay to the limited liability company the following sums, and the managers shall authorize the officers of the limited liability company to issue membership certificates of the limited liability company representing the percentage of members as follows:

Name	Commitment	Contribution	Membership Certificate No.
[redacted]	$2,500 – 10%	$2,500	2
	$2,500 – 10%	$2,500	5
	$2,500 – 10%	$2,500	4
	$1,000 – 4%	$1,000	3
	$12,750 – 51%	$12,750	6
	$1,250 – 5%	$1,250	19
	$2,500 – 10%	$2,500	20

Upon review, counsel's assertions and the submitted documentation do not establish that the petitioner has a qualifying relationship with 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 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, or in this case, membership certificates, alone are not sufficient evidence to determine whether a stockholder or member 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, or equivalent documents, must also be examined to determine the total number of shares or membership units issued, the exact number issued to each shareholder or member, and the subsequent percentage ownership and its effect on control of the company. Additionally, a petitioning company must disclose all agreements relating to 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.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

The evidence submitted with the initial petition indicated that five individuals own the foreign entity, with none of them holding a majority of the shares. The petitioner initially indicated that the U.S. entity has four members, but did not disclose required information regarding the percentage interest owned by each member and the resulting control of the company. The initial evidence suggested that the two companies had three owners in common, but not necessarily sufficient common ownership and control to establish an affiliate relationship as defined at 8 C.F.R. § 214.2(l)(1)(ii)(K)(*2*).

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* **8 C.F.R. § 214.2(l)(3)(viii). In this case, the petitioner failed to submit the required initial evidence to** establish a qualifying relationship with the foreign entity, so the director reasonably requested additional documentation, namely the petitioner's stock certificates (or membership certificates) showing who actually owns the United States company. The petitioner chose to submit its membership certificates numbers 2, 3, 4,

5, 6, 19 and 20, issued to six individuals and one company. The petitioner provided no explanation as to why it initially indicated that the company had only four individual members. 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).

Similarly, the petitioner failed to provide an explanation regarding the absence of membership certificates number 1, and numbers 7 through 18. Without additional clarification, the AAO cannot just assume that these certificates were not issued, and it is therefore not clear whether the petitioner has fully disclosed the identities of all of its members. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, as noted by the director, the evidence submitted in response to the director's request for evidence failed to answer the critical question in this case: who actually owns and controls the United States entity? 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). Instead of providing the requested evidence regarding the petitioner's ownership, counsel stated: "The owners of [the U.S. entity] are the owners of [the foreign entity]." 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).

As none of the submitted membership certificates disclosed the number of membership units issued to each member, and as the petitioner failed to clarify the inconsistencies noted above, the director correctly concluded that the petitioner had not established the existence of the requisite qualifying relationship between the petitioner and the foreign entity.

Counsel for the petitioner now submits additional evidence regarding the ownership and control of the petitioning entity on appeal in the form of a "Pre-Organization Agreement," and claims that the foreign entity owns a 51 percent interest in the petitioning organization. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Counsel has not provided an explanation for the previous omission of the "pre-organization agreement," which provides the type of information specifically requested by the director in her request for evidence.

Further, the existence of the formal pre-organization agreement appears to be contrary to counsel's statement on appeal that "[m]embers' interest [in a limited liability company] is provided for in less informal arrangements, such as [the petitioner's] case." The agreement is not accompanied by secondary evidence, such as evidence that the seven claimed members actually paid for their interest in the company as required by the agreement. Further the petitioner has still not explained why it initially stated that the U.S. company had only four members, or why the company opted not to issue membership certificates number 1 and numbers 7 through 18. 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).

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors or discrepancies, and the petitioner fails to resolve those errors and discrepancies after CIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

The petitioner in this matter has not submitted consistent or credible evidence of its ownership and control and therefore has not established that it has a qualifying relationship with the foreign entity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the evidence of record does not demonstrate that the U.S. entity will support a managerial or executive position within one year of the petition approval as required by 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner has not submitted a business plan or other evidence clearly describing the nature of the proposed office, the scope of the entity, its organizational structure, the size of the United States investment, the financial ability of the foreign entity to remunerate the beneficiary, and the financial ability of the petitioner to commence doing business in the United States. The petitioner indicates that it intends to acquire investment properties and to invest up to $2.5 million in real estate, but has not specifically described the services it intends to provide or provided evidence of funding, other than a single $25,000 wire transfer in the petitioner's bank account. The record also contains no evidence of the financial status of the foreign entity. The petitioner provided a proposed organizational chart listing seven positions subordinate to the beneficiary, but provided no explanation as to when the positions would be filled or what duties the beneficiary's subordinates would perform. 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. at 165.

In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). The minimal evidence submitted with this petition does not demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or

executive who will primarily perform qualifying duties. For this additional reason, the petition cannot be approved.

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

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