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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

PUBLIC COPY

[redacted]

FILE: SRC 06 015 52572 Office: TEXAS SERVICE CENTER Date: APR 05 2007

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, 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, a limited liability company organized in the State of South Carolina, intends to operate a restaurant. The petitioner claims that it is an affiliate of the beneficiary's foreign employer, Operadora Andersons S.A. de C.V., located in Cancun, Mexico. The petitioner seeks to employ the beneficiary as the food and beverage manager 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: (1) that the U.S. company had secured sufficient physical premises to house the new office; or (2) that the claimed foreign affiliate had provided funding or capitalization for the U.S. company.

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 further explains the corporate structure of the United States operations, noting that the petitioner's group established three United States companies, which have different functions in order to satisfy state and local regulatory requirements. Counsel asserts that funding for the business was supplied by the petitioner's ultimate parent company, Alla Las Tengo S.A. de C.V., which is an affiliate of the beneficiary's current foreign employer, through its U.S. affiliate, La Rana Myrtle Beach, LLC. Counsel notes that although the lease for the restaurant is assigned to an affiliate of the petitioner, the petitioner's business is operating in the premises and therefore it has met the regulatory requirements to acquire sufficient physical premises.

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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that 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 involved executive or managerial authority over the new operation;

(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 first issue in this matter is whether the petitioner has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A).

The nonimmigrant petition was filed on October 20, 2005. The petitioner stated that the U.S. entity would be employed at the following address: [redacted]. In a letter dated September 22, 2005, the petitioner indicated that the petitioning company was established to develop and manage a Señor Frog's restaurant, a brand developed by the beneficiary's current foreign employer, in the United States. The petitioner stated that the restaurant would "either be directly owned or licensed to other entities under the management of [the petitioner]."

The petitioner submitted an assignment of lease agreement made between Broadway At the Beach, Inc. as landlord, MBC-Myrtle Beach, LLC as tenant, and [redacted] as successor tenant, granting [redacted] tenancy for the remaining 140 months of the lease, commencing on February 1, 2005. The petitioner provided the following explanation: "Señor Frog's Restaurant will be established in Myrtle Beach, South Carolina. The lease was assumed by [redacted] a licensee of

Operadora Anderson's S.A. de C.V., for the sole purpose of establishing Señor Frog's Restaurant." The petitioner also provided a copy of the original lease agreement between Broadway at the Beach, Inc. and MBC-Myrtle Beach, LLC d/b/a Murray Bros. Caddyshack. The petitioner provided a floor plan and photographs depicting the Señor Frogs restaurant.

The petitioner submitted a corporate organizational chart for the petitioner's group, on which [redacted] is identified as a licensee of the petitioner.

On November 1, 2005, the director issued a request for additional evidence, in part requesting a lease for the petitioner, [redacted] for the principal place of business along with a square footage layout of the premises, in order to establish that premises sufficient to house they new operation have been secured. The director also requested evidence that the petitioner was authorized to conduct business as "Murray Bros. Caddyshack."

In a response dated January 12, 2006, the petitioner re-submitted the lease agreement, assignment of lease agreement, and floor plan provided in support of the initial petition, noting that [redacted] has executed a lease for 8,500 square feet for the restaurant, along with color photographs of the interior and exterior of the Señor Frog's restaurant operating at the location. In response to the director's request for evidence that the petitioner is doing business as "Murray Bros. Caddyshack," the petitioner explained that MBC-Myrtle Beach, LLC d/b/a Murray Bros. Caddyshack was the original lessee for the premises that has been assigned to [redacted] The petitioner's response included a "capitalization" chart, which identified [redacted] as an affiliate of the petitioner.

The director denied the petition on February 10, 2006, concluding that the petitioner had not established that the U.S. company has secured sufficient physical premises to operate the new office. The director observed that neither the original lease agreement nor the assignment of the lease named the petitioner, [redacted], as the tenant.

On appeal, counsel for the petitioner explains that the corporate structure of the petitioner's group in the United States consists of three companies: (1) Big Gorilla, LLC, which is the holding company for all operational subsidiaries; (2) [redacted] which is responsible for the construction of the premises and applying for food and liquor licenses; and (3) [redacted] (the petitioner), which will provide management and supervision of the operations. Counsel further asserts:

> The petitioner has secured premises sufficient to house the business through its affiliate, [redacted] is an affiliate of the petitioner because it is effectively controlled through its corporate and management structure. The corporate structure provides that [two-thirds] of the voting managers (officers) be owners or affiliates of the petitioner. Furthermore, 85% of the membership interest (stock) is effectively controlled by the petitioner through an assignment of the membership interest by its initial member. . . . the purpose of this structure was solely to facilitate the approval of a liquor sales license, which requires that at least one of the managers of the LLC be a South Carolina resident.
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> The lease was secured on January 4, 2005 and provides for 8.500 square feet of useable space. The lease was assigned to [redacted] and has a term of

140 months, commencing February 1st, 2005. Currently, the business is operating in the premises and has over 60 employees.

In support of the appeal, the petitioner submits an assignment of interest dated June 20, 2005, for [redacted] in which Caribbean Capital Fund, LLC, the original owner of a 100% membership interest in the company, assigned an 85 percent interest to [redacted] who is claimed to be the owner of both the beneficiary's foreign employer and the petitioner's ultimate parent company, [redacted], in Mexico.

Upon review, the assertions of the petitioner and counsel are not persuasive. As noted by the director, the lease agreement does not name the petitioner as a tenant, although the evidence of record indicates that the restaurant is in fact operating at the leased premises. While the petitioner has described a multi-company structure in the United States and an explanation that the lease is held by the petitioner's U.S. affiliate, the petitioner has not adequately documented its relationship with [redacted] or described how responsibility for various aspects of the restaurant's operations would be divided between the companies. The initial information provided by the petitioner was that [redacted] is a "licensee," rather than an affiliate, and this discrepancy has not been explained. 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).

In light of this discrepancy, the AAO finds the "assignment of interest" transferring ownership of [redacted] to be insufficient to establish the claimed affiliate relationship. Further, while it appears that the restaurant was operational at the time of filing or soon thereafter, there is no documentary evidence confirming that the petitioner, as opposed to the claimed affiliate, is in fact operating the restaurant. 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)). Therefore, the petitioner's claims fail on an evidentiary basis, and the appeal will be dismissed.

The second issue addressed by the director is whether the U.S. company was funded by the foreign entity at the time the petition was filed. When filing a petition for a beneficiary who is to be employed in a new office, the petitioner is required to submit evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(v)(C)(*2*).

In support of the petition, the petitioner submitted an unaudited balance sheet for the U.S. company, dated May 23, 2005, showing assets in the amount of $1,626,860 in the form of a note receivable from [redacted] as well as equity in the form of capital from Big Gorilla LLC, the petitioner's sole member, in the amount of $1,626,860. The petitioner also provided an "investment estimate" for Señor Frog's Myrtle Beach, showing a total budget of $3,150,239 for various expenses. The petitioner's initial submission did not include other evidence to establish the funding or investment in the United States entity. Accordingly, on November 1, 2005, the petitioner requested evidence of the funding or capitalization of the U.S. company to include copies of wire transfers showing transfer of funds from the foreign organization and evidence of financial resources committed by the foreign company, such as copies of bank statements for the U.S. company's checking and savings accounts.

In its response dated January 12, 2006, the petitioner submitted a "capitalization chart" showing that Alla Las Tengo, S.A. de C.V., a member of Big Gorilla LLC, the petitioner's immediate parent company, and a claimed affiliate of the beneficiary's foreign employer, transferred funds in the amount of $1,200,000 as capital to [redacted] in three separate transactions in May 2005. The chart shows that the money was then loaned to the petitioner through the issuance of a promissory note from [redacted] payable to the petitioner. The petitioner provided copies of the three wire transfers identifying the originator of the funds as Alla Las Tengo S.A. de C.V. and the recipient as [redacted] The petitioner also provided a copy of a promissory note by which [redacted] promised to pay to the order of El Sapo Myrtle Beach, LLC [the petitioner] an unspecified amount. The promissory note, which is dated May 23, 2005, references a "Security Agreement," dated March 31, 2005, but a copy of the security agreement has not been provided for the record. The promissory noted indicates that the principal amount is due and payable on December 31, 2006.

The director denied the petition on February 10, 2006, concluding that the petitioner had not established that the funding or capitalization of the petitioner was committed by the foreign entity. The director observed that the wire transfer transactions were made to [redacted] rather than to the petitioner. The director also noted that Alla Tengo S.A. de C.V. "is not the foreign corporation." Referencing the promissory note made by the claimed U.S. affiliate, the director determined: "This loan from the U.S. company is not considered funding from the foreign entity nor is the promissory note considered committed funds." Finally, the director noted that CIS had specifically requested evidence of financial resources committed by the foreign entity to include copies of bank statements for the U.S. business checking and saving accounts, yet the petitioner failed to provide these documents. The director concluded that the petitioner did not establish that the beneficiary's employer, Operadora Anderson's S.A. de C.V., provided funding to the U.S. petitioner.

On appeal, the petitioner submits the following statement:

> The petitioner has received committed funds in the form of capital contributions for the start-up and construction of the business from Alla Las Tengo S.A. de C.V., which is a foreign affiliate of the petitioner. . . . All the funds provided by Alla Las Tengo S.A. de C.V. are accounted for as capital contributions of the petitioner and are supported by resolutions and financial statements. . . . The funds received from Alla Las Tengo S.A. de C.V. is not a promissory note, but rather a capital contribution.
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> The funds were sent directly to [redacted] (an affiliate) by Alla Las Tengo SA de CV for the construction and start-up of the business and are properly documented with resolutions, contracts, and financial statements as committed capital of the petitioner. . . . the funds are available to the petitioner because of the affiliate relationship and the effective control of the company by the same shareholder. A promissory note has been issued between the two U.S. affiliates [redacted] and [redacted] which was done in this manner solely for local and state regulatory requirements.

The petitioner attaches a copy of a May 2005 bank statement for [redacted] which reflects two wire transfers from Alla Las Tengo S.A. de C.V. in the amounts of $450,000 and $150,000. According to a summary attached by the petitioner, the third wire transfer in the amount of $600,000 was credited to a

different account owned by La Rana Myrtle Beach, LLC, but the petitioner has not provided a copy of the bank statement for that account.

Upon review, the AAO finds insufficient evidence of the funding or capitalization of the petitioning company by a related foreign party. Although the record confirms monies transferred from Alla Las Tengo S.A. de C.V., which appears to be the petitioner's ultimate parent company, to the petitioner's claimed affiliate, [redacted] the record contains no evidence of monies transferred to the petitioning organization. As discussed above, the petitioner has not submitted sufficient evidence to document its claimed affiliate relationship with [redacted] LLC, nor does it appear that the claimed relationship existed at the time the wire transactions occurred or at the time the promissory note was signed. The only financial document submitted for the petitioning entity was an unaudited balance statement which indicated that the company had received capital in the amount of $1,626,860 from its sole member, Big Gorilla, LLC, yet the petitioner did not provide any supporting documentation related to this capital investment. Finally, as noted above, the promissory note does not specify the amount of funds involved, and the document contains repeated references to the terms of a March 31, 2005 security agreement that has not been provided for the record. 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.

The AAO acknowledges the petitioner's claims that there were legitimate business reasons for establishing a multi-company organizational structure for the operation of the Señor Frog's restaurant located in Myrtle Beach, South Carolina, and under the circumstances, would be willing to consider evidence that the petitioner's lease agreement and funding were both attained through its claimed affiliate, [redacted]. However, as discussed above, the petitioner has provided neither adequate explanation nor sufficient documentary evidence in support of its claims regarding the affiliate relationship and the multi-company structure, nor adequately described the separation of responsibilities between the two companies in the United States. Based on the evidence provided, it has not been clearly established that the petitioning company, [redacted] was capitalized at the time the petition was filed, or that it would be the entity operating the restaurant or otherwise engaged in the provision of goods and/or services in the United States. Accordingly, the appeal will be dismissed.

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.