U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

FILE: WAC 06 140 50618 Office: CALIFORNIA SERVICE CENTER Date: AUG 03 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, California Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to 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 California limited liability company, operates as a tequila importer and distributor. The petitioner states that it is an affiliate of Tequila Las Americas S.A. de C.V., located in Mexico. The beneficiary was granted a one-year period of stay in L-1A status to open a new office in the United States, from March 7, 2005 until March 6, 2006, and the petitioner's subsequent request for an extension was denied. The petitioner now seeks to employ the beneficiary as its president for a three-year period.

The director denied the petition, concluding that the petitioner had failed to establish that there is a qualifying relationship between the U.S. petitioner and the beneficiary's previous foreign employer.

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 director's decision contains errors of fact, and contends that the evidence submitted "overwhelmingly demonstrates" that the U.S. company is both a qualifying subsidiary and branch of the foreign entity. Counsel submits a brief 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 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 director's decision contains errors of fact, and contends that the evidence submitted "overwhelmingly demonstrates" that the U.S. company is both a qualifying subsidiary and branch of the foreign entity. Counsel submits a brief in support of the appeal.

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)(14)(ii) also 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 sole issue addressed by the director is whether the petitioner has established that a qualifying relationship exists between the U.S. company and the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

At the time of filing, the petitioner stated on Form I-129 that it has an affiliate relationship with the foreign entity. Specifically, the petitioner stated the following where asked to describe the stock ownership and control of each company:

[redacted] – 33% stock ownership and managerial control [redacted]
[The U.S. petitioner] – 80% ownership and managerial control [redacted]

The petitioner submitted a copy of the foreign entity's "contract of incorporation" dated February 24, 1999, which described the ownership of that company as follows:

Shareholder	Shares	Value
[redacted]	17 shares	$17,000
	17 shares	$17,000
	17 shares	$17,000
TOTAL:	51	$51,000

The petitioner also provided the operating agreement for the U.S. company, dated October 20, 2003, which indicates the following ownership structure:

Member	Distribution Percentage
[redacted]	Eighty percent (80%)
	Fifteen percent (15%)
	Five percent (5%)

The operating agreement includes a schedule intended to document the capital contributions of each member, but it has not been completed. The petitioner also submitted a copy of its 2005 IRS Form 1065, U.S. Return of Partnership Income, with Schedules K-1, indicating that the beneficiary owns 75% of the U.S. company, while [redacted] owns the remaining 25% interest in the company.

On April 13, 2006, the director issued a request for additional evidence, in part requesting evidence of ownership of the foreign entity, as well as documentation to establish that the U.S. company and the foreign company have a qualifying relationship. Specifically, the director requested proof of stock purchase of the U.S. entity, copies of all of the U.S. company's stock certificates, stock ledger, and a detailed list of owners for both companies.

In a response dated July 10, 2006, counsel for the petitioner re-submitted the foreign entity's contract of incorporation, and the U.S. entity's operating agreement and 2005 Form 1065. In response to the director's request for documentation of the stock purchase of the U.S. company, the petitioner submitted: (1) the U.S. company's Bank of America account statement dated December 23, 2004, showing a balance of $3,446.41; (2) a wire transfer receipt dated January 7, 2005, showing a transfer to the petitioner's checking account in the amount of $9,000, originating with [redacted] (3) a receipt for a wire transfer in the amount of $9,000 dated October 12, 2004, originating with [redacted] deposited into her personal bank account; and (4) a receipt for a wire transfer in the amount of $4,000, dated December 14, 2004, originating with [redacted], which was deposited into the checking account of [redacted]

Counsel stated that the wire transfers from [redacted] in the amounts of $4,000 and $9,000 evidence the foreign entity's initial investment in the U.S. company. The petitioner submitted additional evidence pertaining to a home equity loan and line of credit taken out against the beneficiary's home in the United States. Counsel states that $200,000 was borrowed to be used as "capital infusion" for the U.S. company.

Finally, counsel reiterated that the members of the U.S. company include the beneficiary, [redacted], and [redacted]

The director denied the petition on July 26, 2006, concluding that the petitioner had failed to establish that the petitioner has a qualifying relationship with the foreign entity. The director observed that the evidence provided did not support a finding that both organizations are owned and controlled by the same parent, individual, or by an identical group of individuals who each own and control approximately the same share of proportion of each organization. The director further found that the evidence did not show that an individual or an identical group of individuals has effective *de jure* or *de facto* control of both organizations. Finally, the director also noted that there was no evidence of a parent or subsidiary relationship between the two companies.

On appeal, counsel for the petitioner asserts that the director failed to consider all types of qualifying relationships defined under 8 C.F.R. § 214.2(l)(1)(ii). Counsel further claims to be "baffled at the Government's conclusion that the beneficiary owns 80% of the total shares of the U.S. entity when none of its submissions related to the organizational structure of the U.S. corporation provides such information."

Counsel claims that a qualifying relationship exists between the U.S. and foreign companies "in the corporate form of a parent, or branch, or subsidiary." Counsel states that the evidence "overwhelmingly demonstrates" that the U.S. entity is a subsidiary of the Mexican company, and claims that the U.S. company is also a branch of the foreign entity, as it is "clearly" an operating division of the foreign entity based in San Diego, California. Finally, counsel asserts that the U.S. entity is a subsidiary of the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(K) because the Mexican company owns less than half of the U.S. entity but in fact exercises control over the organization.

Counsel's assertions are not persuasive. Upon review, the petitioner has not established that the U.S. company and the foreign entity have a qualifying relationship.

As noted by the director, 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.

The petitioner's initial statement on Form I-129 suggested that the petitioner sought to establish an affiliate relationship between the U.S. and foreign entities based on common control by the beneficiary, who was claimed to own 33 percent of the foreign entity and 80 percent of the U.S. entity.

The record establishes that three individuals own the foreign company in equal proportions. Although the petitioner initially suggested that the beneficiary in fact controls this company with his minority interest, there has been no documentary evidence submitted to support this claim. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish the beneficiary's controlling interest over the foreign entity, the petitioner has not established that the beneficiary in fact controls that company, and cannot establish an affiliate relationship between the two companies based on common ownership and control by the beneficiary. 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)).

The record contains inconsistent evidence and claims regarding the ownership of the petitioning company. The petitioner initially claimed, and the petitioner's operating agreement indicates, that the beneficiary owns 80 percent of the U.S. company. The petitioner's October 2003 operating agreement indicates that the remaining 20 percent interest in the U.S. company is owned by two individuals, while the petitioner's 2005

Form 1065 indicates that the beneficiary owns a 75 percent interest in the U.S. company, and his spouse owns the remaining 25 percent interest. On appeal, counsel repudiates the director's conclusion that the beneficiary owns 80 percent of the U.S. company, and claims that the evidence submitted does not provide this information. Counsel now claims that the Mexican entity in fact owns less than half of the U.S. entity but in fact exercises control over the organization. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

Contrary to counsel's statements on appeal, the petitioner's operating agreement does in fact show that the beneficiary owns an 80 percent interest in the U.S. company. Furthermore, there is no documentary evidence to support counsel's new claim that the foreign entity owns an interest in the U.S. company, as the petitioner's operating agreement and IRS Form 1065 indicate no such information. 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).

Although the petitioner attempted to establish that the foreign entity invested $13,000 in the U.S. entity, the only evidence of a wire transfer deposited to the U.S. entity's account was originated by an individual whose ties to the foreign entity have not been explained. There is no persuasive evidence that the foreign entity purchased a membership interest in the U.S. limited liability company, and, as noted above, no evidence that the foreign entity is even acknowledged as a member on the company's corporate documents. Accordingly, as it has not been establish that the foreign entity owns the U.S. company, in whole or in part, the foreign entity is not a "parent" and the U.S. company is not a "subsidiary" of the foreign company. *See* 8 C.F.R. §§ 214.2(l)(1)(ii)(I) and (K).

Counsel's claim that the U.S. company is a branch office of the foreign entity is not corroborated by the record. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). U.S. Citizenship and Immigration Services (USCIS) has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, *supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal

Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies of IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

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

Here, the U.S. petitioner is a limited liability company organized in the State of California. As such, it does not qualify as a branch office of the foreign entity, and the petitioner must instead establish that there is a qualifying parent-subsidiary or affiliate relationship between the two companies. As discussed above, the petitioner has not met this burden.

While there is some commonality of ownership between the two foreign and U.S. companies, the record is insufficient to establish that the companies share the required degree of common ownership and control by the same individual or by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity. *See* 8 C.F.R. § 214.2(l)(1)(ii)(K). The petitioner has not documented its claimed qualifying relationship with the foreign entity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition, as those terms are defined at sections 101(a)(44)(A) and (B) of the Act. The record indicates that the beneficiary was the only employee of the U.S. company at the end of the first year of operations, and the petitioner stated that his duties include "every aspect [of] business development, including, but not limited to inventory, marketing, vendor contact and development, light book keeping and accounting and distribution." The petitioner has not identified any managerial or executive duties to be performed by the beneficiary in his capacity as president of the U.S. company. Rather, he appears to be solely responsible for the day-to-day operation of the U.S. company, including all non-qualifying tasks. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The record must establish that the majority of the beneficiary's duties will be primarily directing the management of the organization or a component or function of the organization, and that someone other than the beneficiary performs the non-managerial and non-executive duties required to operate the business on a day-to-day basis. Here, that burden has not been met. Although counsel for the petitioner states that the company will be staffed in the next 12 months, 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. 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). 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or 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 and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.