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U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 07 108 52640 Office: VERMONT SERVICE CENTER Date: DEC 04 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)

FOREIGN ATTORNEY 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, Vermont 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 rejected as improperly filed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1B nonimmigrant intracompany transferee with specialized knowledge 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 claims that it is the parent company of the beneficiary's foreign employer, Corsidian Caribbean Dominicana, located in the Dominican Republic. The petitioner, a Puerto Rico corporation, is a software solutions provider. The petitioner seeks to employ the beneficiary as a telecommunication specialist for a three-year period.

The director denied the petition concluding that the petitioner failed to establish that the United States and foreign entities have a qualifying relationship.

On appeal, counsel for the petitioner asserts that the beneficiary's foreign employer is a subsidiary of the U.S. entity, and explains that certain "necessary changes in stock ownership" in the foreign entity "were not processed on time to comply with the petition." Counsel submits a brief and additional evidence in support of the appeal.

U.S. Citizenship and Immigration Services (USCIS) regulations specifically limit the filing of an appeal to an affected party (the person or entity with legal standing) and/or to the party's attorney or representative authorized pursuant to 8 C.F.R. § 292. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). In this matter, although the petition is accompanied by a Form G-28, Notice of Entry of Appearance by an Attorney or Representative, the claimed attorney/representative has not established that he or she is a licensed attorney or an accredited representative authorized to undertake representations on the petitioner's behalf. *See* 8 C.F.R. § 292.1.[1] Accordingly, the foreign attorney's appearance will not be recognized, and the appeal filed by the unauthorized counsel in this matter must be considered as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(i).

As the appeal was not properly filed, it will be rejected. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

The AAO notes for the record that even if the appeal had been properly filed, it would be dismissed.

To establish eligibility for the nonimmigrant L-1 visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the

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[1] Counsel did not indicate on Form G-28 that he is an attorney in good standing of the bar of the United States or the highest court of any State, territory, insular possession or the District of Columbia. Counsel also did not indicate that he is an accredited representative of a religious, charitable, social service or similar organization recognized by the Board. Counsel marked "Other" and indicated that he is an "AILA member." When asked to verify whether he is a U.S. attorney or an accredited representative, counsel indicated that he is licensed by the Supreme Court in the Dominican Republic.

beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. 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 sole issue addressed by the director is whether the U.S. company established that the U.S. company has a qualifying relationship with the beneficiary's claimed foreign 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).

On the L Classification Supplement to Form I-129, the petitioner indicated that the U.S. company owns 100% of the foreign entity, Corsidian Caribbean Dominicana.

In a letter dated January 29, 2007, the petitioner referenced an affiliate relationship between "Corsidian Caribbean Dominicana, Inc." and the U.S. company, but did not specifically describe the ownership and control of either company. With respect to the ownership of the United States company, the petitioner attached as exhibit K a document identified as its "state certification." The document is a "checklist" for the formation of a Delaware corporation, which indicates that "at the moment" the company intended to distribute its shares as follows:

[redacted] 72.86%
11.87%
11.87%
3.39%

The document is not dated and it is unclear by whom it was prepared. There is no evidence in the record that the petitioner was ever incorporated in Delaware.

The petitioner's exhibit K also included an un-translated "*Certificado de Registro*" which indicates that the U.S. company was registered under the laws of the Commonwealth of Puerto Rico on July 28, 2004. This document is consistent with other evidence in the record, including the petitioner's tax returns and audited financial statements, indicating that the petitioner is a Puerto Rico corporation established on that date.

The petitioner attached as exhibit M a document identified as "Corsidian Affiliate Tax Certification." The document, which is not translated, appears to be a receipt for a payment made to the *Oficina Nacional de la Propriedad Industrial* on behalf of Corsidian Caribbean Dominicana on January 14, 2005.

On March 21, 2007, the director issued a request for evidence instructing the petitioner to submit additional evidence to establish that there is a qualifying relationship between the U.S. company and the Dominican Republic entity. Specifically, the director requested: (1) copies of the foreign entity's articles of incorporation and by-laws; (2) a copy of the foreign company's certificate of incorporation; (3) additional documentary

evidence showing all stock/shares ownership and control of the foreign entity; and (4) evidence that the foreign entity is doing business, including copies of contracts, purchase orders, invoices, bank statements, tax returns, and/or audited or reviewed financial statements.

In a response dated March 30, 2007, the petitioner explained the relationship between the U.S. entity and the Dominican Republic company as follows:

> [P]lease note that the relationship between [the petitioner] and [the foreign entity] is very tight, because both corporations are managed and operated by Mr. Nelson Aviles, President and principal stockholder of both corporations.
>
> [The petitioner] has been in operations in the Dominican Republic prior to be incorporated in 2005 as demonstrated in their previous application for L-1B status (EAC0580014473). They have always maintained engineers providing technical support to their main clients [in the Dominican Republic] and as it is customary in the industry, all engineers always work from their homes and visit the clients to provide the necessary support, moreover, [the foreign entity] does not have other operating expenses than the salaries paid to their engineers and all taxes related to their operations in the Dominican Republic are paid through their corporate taxes in Puerto Rico, as most of their contracts are made at the headquarters of the parent companies of their clients.

The petitioner submitted a document identified as "Evidence of Stock Ownership and Control of the Foreign Entity" which shows that Nelson Avila owned 800 of 1,000 issued shares as of June 2005. The petitioner also submitted articles of incorporation for the foreign entity, but provided only very brief summary English translations for all Spanish-language documents submitted. The petitioner provided a copy of its Puerto Rico Corporate Income Tax Return for 2005, including an attachment indicating that the company received a credit for taxes paid in the Dominican Republic.

The director denied the petition on March 12, 2007, concluding that the petitioner failed to establish that the U.S. company has a qualifying relationship with the foreign entity. The director observed that, based on the evidence submitted, the foreign entity is majority-owned by Nelson Aviles, while the U.S. entity is majority-owned by [redacted] The director acknowledged the petitioner's claim that Nelson Aviles is the president of both companies, but noted that "such a position does not constitute legal ownership and control of a company."

On appeal, counsel for the petitioner asserts that the Dominican Republic company meets the criteria of a "subsidiary" because the U.S. company "has been from the beginning in control, directly and indirectly, even when they did not change the stocks on time." Counsel emphasizes that the U.S. company's tax return included revenues from the Dominican Republic company, and that the petitioner provided evidence that all contracts with clients in the Dominican Republic were executed by the U.S. company as the parent company. Counsel further states on Form I-290B that "the stockholders in [the petitioning company] agreed to make the necessary changes in the stock ownership in Corsidian Dominican, however, they were not processed on time, to company with the petition." Counsel indicated that as of the date the appeal was filed, Nelson Aviles was

in the process of transferring the majority of stocks in the Dominican Republic company to Andrew Salisbury.

Subsequently, the petitioner submitted evidence that a majority of the shares of Corsidian Caribbean Dominicana C. por A. were transferred to Andrew Salisbury on May 25, 2007. Other changes in stock ownership occurred such that the owners of the foreign entity and the purported owners of the U.S. company are now identical.

Upon review, the record does not contain evidence that a qualifying relationship existed between the U.S. and foreign entities as of the date the petition was filed. There are several deficiencies in the petitioner's evidence. First, there is no evidence in the record to support the petitioner's initial claim that the U.S. company owns 100 percent of the foreign entity. The relationship the petitioner is attempting to establish on appeal is an affiliate relationship, not a parent-subsidiary relationship. 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).

Contrary to counsel's assertions, the foreign entity cannot be considered a subsidiary of the U.S. company simply because the U.S. company has paid taxes on money earned in the Dominican Republic and has signed contracts with customers who are located there. 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.

Second, on appeal, counsel concedes that the U.S. company and the foreign entity did not possess the requisite common stock ownership, but dismisses this deficiency as a "mere formality," because the companies had intended to adjust the stock ownership of the foreign entity. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

Finally, the record does not contain credible evidence of the ownership of the U.S. company. As noted above, the only document that references the company's ownership is a "checklist" for formation of a Delaware company. There is no evidence in the record to show that the petitioner is actually incorporated in Delaware, and this document is not valid evidence of the company's ownership. 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)). Based on these deficiencies the AAO concurs with the director's determination that the petitioner failed to establish the existence of a qualifying relationship between the U.S. and foreign entities.

Although not addressed by the director, the AAO notes for the record that the petitioner has not established that the beneficiary has been employed by the foreign entity on a full-time basis for one continuous year within the three years preceding the filing of the petition. As evidence of the beneficiary's employment, the petitioner has submitted copies of three invoices for "professional services" issued to the U.S. company by the beneficiary, one for the months of March 2005 to December 2005, one for all of 2006, and one for the month of January 2007. The beneficiary's resume indicates that he was concurrently employed with an unrelated employer from 1999 through 2006, a period which overlaps with his claimed period of qualifying employment with the foreign entity. Based on this evidence, it appears that the beneficiary was a part-time independent contractor of the U.S. company who happened to be based in the Dominican Republic, rather than a full-time employee of the foreign entity, as claimed by the petitioner.

Finally, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been employed in a specialized knowledge position or that the beneficiary is to perform a job requiring specialized knowledge in the proffered position. Although the petitioner asserts that the beneficiary's position requires specialized knowledge, the petitioner has not articulated any basis to the claim that the beneficiary is or will be employed in a capacity requiring specialized knowledge. Other than submitting a general description of the beneficiary's job duties, the petitioner has not identified any aspect of the beneficiary's position which involves special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests. The petitioner has not submitted any evidence of the knowledge and expertise required for the beneficiary's position that would differentiate that employment from the position of "telecommunication specialist" at other employers within the industry. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

As the appeal will be rejected, these issues need not be addressed further. Even if the appeal had been properly filed, the appeal would be dismissed for the above stated reasons. 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 rejected.