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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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File: WAC 05 087 51430 Office: CALIFORNIA SERVICE CENTER Date: FEB 0 1 2007

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)

IN 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of president to open a new office in the United States 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 corporation organized under the laws of the State of Arizona, claims to be engaged in the sale of industrial equipment, and alleges that it is the subsidiary of [redacted] of India.

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. Specifically, the director determined that the petitioner did not establish that the foreign employer furnished consideration in exchange for stock ownership, and that the record instead indicates that an unrelated British company furnished the consideration.

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 to the petitioner asserts that, while the British company did transfer money to the petitioner in exchange for stock, this money was transferred by the British company on behalf of the foreign entity as its lender. Counsel further argues that the foreign entity became indebted to the British company via a promissory note and that the foreign entity has since repaid this obligation in Indian Rupees. In support of the appeal, counsel submits a brief and additional evidence.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states 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, 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; 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 primary issue in this proceeding is whether the petitioner has established that it and the organization which employed the beneficiary abroad are qualifying organizations as defined in 8 C.F.R. § 214.2(l)(1)(ii)(G).

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed United States employer are the same employer. *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l). Title 8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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." A "subsidiary" is defined, in part, as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity."

In this matter, the petitioner asserts that it is a subsidiary of the foreign employer, [redacted] In support of this assertion, the petitioner provided organizational documents and stock certificates which indicate that 100% of the petitioner's stock has been issued to the foreign entity.

On March 11, 2005, the director requested additional evidence. Specifically, the director requested evidence that demonstrates "that the foreign parent company has, in fact, paid for the U.S. entity."

In response, the petitioner provided evidence that a British company, [redacted], transferred $30,000.00 to the beneficiary and her husband in the United States as consideration for the issuance of the petitioner's stock. The petitioner provided further evidence that this sum was then transferred into petitioner's bank account by the beneficiary and her spouse. Counsel explained in a letter dated May 27, 2005 that the owner of [redacted] is a relative of the managing director of the foreign entity, and that [redacted] agreed to transfer the funds on behalf of the foreign entity in order to "bypass the Indian bureaucracy." This explanation was corroborated by the foreign entity in a letter dated May 15, 2005 in which it states that it intends to repay [redacted] in Indian Rupees. However, the petitioner provided no evidence that the foreign entity was legally obligated to repay the purported loan and did not provide any objective evidence corroborating its assertion that the "Indian bureaucracy" renders the transfer of funds to the petitioner impossible or impracticable.

On August 5, 2005, the director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. Specifically, the director determined that the petitioner did not establish that the foreign employer furnished consideration in exchange for stock ownership and that the record instead indicates that [redacted]. furnished the consideration.

On appeal, counsel asserts that, while [redacted] did transfer money to the petitioner in exchange for stock, this money was transferred by the British company on behalf of the foreign entity as its lender. Counsel further argues that the foreign entity became indebted to the British company via a promissory note and that the foreign entity has since repaid this obligation in Indian Rupees. In support of the appeal, counsel provides a copy of the alleged promissory note and evidence that this debt has been repaid in Indian Rupees by the foreign entity.

Upon review, the petitioner's assertions are not persuasive.

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 regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence could include stock purchase agreements, subscription agreements, corporate bylaws, proxies, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In this matter, the petitioner has not established that its stock was acquired by the foreign entity and, thus, has not established that a qualifying relationship exists. The record establishes that an unrelated entity, [redacted], transferred money to the beneficiary and her husband allegedly as consideration for the stock issued by the petitioner to the foreign entity. The record does not establish that the foreign entity was obligated to repay [redacted] for wiring these funds or that the Indian government mandated such a roundabout method of transferring funds. While the petitioner attempts on appeal to supplement the record with evidence establishing that the foreign entity was legally indebted to [redacted] and that its debt has been repaid in Indian Rupees, the petitioner was put on notice by the director in the March 11, 2005 Request for Evidence of the need to provide evidence regarding the acquisition of stock by the foreign entity. 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 and does not consider the sufficiency of the promissory note submitted on appeal.

Accordingly, the petitioner has not established that it and the organization which employed the beneficiary abroad are qualifying organizations, and the petition may not be approved for that reason.

Beyond the decision of the director and for the same reasons articulated above, the petitioner did not establish that the foreign entity made an investment in the United States operation as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*), and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner did not establish that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In the initial petition, the petitioner provided a copy of a "Commercial Lease" for space described as "office/retail." As the lessee in the Lease is the beneficiary and not the petitioner, it has not been established that the petitioner has secured sufficient physical premises to house the petitioner's business. Moreover, the Lease prohibits the assignment of the Lease to a third party, including the petitioner, without the written consent of the lessor. The record is devoid of any evidence that the lessor has agreed pursuant to the Lease to its assignment to the petitioner. Therefore, the petitioner has not established that it has secured sufficient physical premises to house its new office, and the petition may not be approved for this additional reason.

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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.