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U.S. Citizenship and Immigration Services

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File: SRC 05 011 50712 Office: TEXAS SERVICE CENTER Date: FEB 21 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, 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 extend the employment of its chief executive officer 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 corporation organized in the State of Georgia that claims to be engaged in investment and acquisition of retail enterprises. It claims that it is the affiliate of Ricky's News, located in Enfield, Middlesex, United Kingdom. The beneficiary was initially granted a one-year period of stay to open a new office as well as a two-year extension of this initial period. The petitioner now seeks to extend the beneficiary's stay for an additional two years.

The director denied the petition, concluding that the petitioner's failure to file an amended petition to reflect the change in the beneficiary's U.S. employment precluded the petitioner from further extending the beneficiary's L-1A status. Additionally, the director found that the petitioner failed to show that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

Counsel for 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 erred by finding that the beneficiary did not qualify for an extension of the petition, and asserts that the petitioner did in fact establish that the regulatory requirements had been met prior to adjudication. In support of this assertion, counsel for the petitioner 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.

The regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) also provides that "the petitioner shall file an amended petition, with fee, at the Service Center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e., from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act."

The first issue in the present matter is whether the petitioner's failure to file an amended petition to reflect a change in the beneficiary's employment precludes the petitioner from extending the beneficiary's status.

The beneficiary was originally granted L-1A status in October 2002 to render his services to a U.S. subsidiary of the foreign entity which was incorporated in the State of New Jersey. In a letter of support dated October 14, 2004, prepared by the beneficiary in his capacity as chief executive officer, the beneficiary explained his duties, and noted that one of his main duties was to expand the petitioner's operations. Specifically, he explained that since his arrival in the United States, the petitioner had acquired a "Super Shop Food" convenience store in New Jersey. In addition, the beneficiary indicated that on June 3, 2003, a new company sharing the petitioner's name had been incorporated in the State of Georgia, and that the beneficiary's duties now included rendering services to the Georgia corporation as well as the New Jersey corporation. The extension request now before the AAO names the Georgia corporation, not the New Jersey corporation, as the petitioner.[1]

In support of the petitioner's contentions, documentation establishing the incorporation of the Georgia company has been presented. Based on this information, which includes the company's Certificate of Incorporation and Articles of Incorporation, it is evident that the Georgia company is a separate and distinct legal entity apart from the New Jersey corporation. There is no documentation in the record establishing that the Georgia corporation is a branch office of the original petitioner, nor is any evidence of the Georgia company's ownership contained in the record. The petitioner relies on the claim that the original New Jersey petitioner and the newly established Georgia corporation share a common name as evidence that these companies are the same.

The initial L-1A petition authorized the beneficiary to render his services to the New Jersey petitioner for a period of two years. The extension request, denied by the service center and currently before the AAO on appeal, is filed on behalf of an entirely different corporation based in Georgia. By virtue of its status as a

[1] It should be noted that, according to Georgia state corporate records, the petitioner's full name is [redacted] Moreover, state records indicate that the petitioner's corporate status in Georgia was automatically dissolved/revoked on July 9, 2005. Although the reason for this automatic dissolution/revocation is unclear, it raises the issue of the company's continued existence as a legal entity in the United States.

Georgia corporation, it is evident that the newly-named petitioner is not a branch of the New Jersey corporation, and therefore does 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 and the New Jersey corporation. *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). Furthermore, the petitioner has provided no ownership information to establish that these two entities in fact have any kind of affiliation. The petitioner, however, claims that the beneficiary has been rendering his services to the Georgia corporation since its incorporation in 2003, and discusses its recent acquisition of a Kentucky Fried Chicken restaurant through its investment in a company identified as [redacted] Chicken LLC. Accepting this admission as true, it appears that the beneficiary has been working in the United States without authorization since June of 2003, since his L-1 visa authorizes him to work for the New Jersey corporation only.

The regulation at 8 C.F.R. § 214.2(l)(7)(i)(C) requires a petitioner to file an amended petition, with fee, when substantial changes to the original petition affecting the beneficiary's eligibility occur. In this matter, however, the petitioner has elected to request an extension of the original petition, yet files the request on behalf of a newly-incorporated company whose relationship with the foreign entity and the original petitioner is unclear. An amended petition is required in such a case to reflect an additional qualifying organization for whom the beneficiary is authorized to work, as there is no blanket petition in this matter and, furthermore, there is no evidence that the newly-incorporated Georgia corporation in fact has a qualifying relationship with the foreign entity.

Based on the uncertain relationship between the foreign entity, the original petitioner, and the newly-incorporated entity, the AAO is unable to conclude that the petitioner's extension request is warranted. On appeal, counsel for the petitioner asserts that the director erred in denying the petition on this basis, claiming that the New Jersey corporation is in fact the beneficiary's employer. Counsel asserts that the New Jersey company is the parent company, and that the Georgia company is merely an investment vehicle which is investing in restaurant operations. Counsel fails to explain, however, why the extension request was filed on behalf of the Georgia corporation, which is a separate and distinct legal entity from the New Jersey corporation. 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).

Additionally, the petitioner claims on the Form I-129 and throughout the record that the beneficiary will be rendering his services to the Georgia corporation, and will spend some time working at the New Jersey corporation. Again, as the beneficiary is not authorized to render services under the original petition to an employer other than the New Jersey petitioner, this assertion is not persuasive. Counsel's contention that the beneficiary has always been employed by the New Jersey corporation, and that the New Jersey and Georgia companies are affiliates, are insufficient to establish eligibility in this matter. 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). These continued assertions do little to explain why the extension request was filed on behalf of the Georgia corporation, a separate and distinct legal entity, if in fact the beneficiary will continue to render his

services exclusively to the New Jersey petitioner. For the reasons explained above, the AAO concurs with the director's findings.

The second issue in this matter is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity.
Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

With the petition, the petitioner submitted a letter of support dated October 14, 2004. The letter explained that the beneficiary was acting as the chief executive officer, and not as a manager as previously set forth in the initial petition. With regard to the beneficiary's duties, a first-hand description was provided by the beneficiary, who executed the support letter in his capacity as the company's chief executive officer. The beneficiary stated:

I continue to fulfill the following responsibilities:

1. Locate and negotiate the acquisition of targeted businesses;
2. Recruit and train managerial and other subordinate employees;
3. Direct the management of the company, including day-to-day operations; and
4. Establish and implement corporate policies for the U.S. company.

I will continue to possess the ultimate authority to hire and fire, as well as to contract for and bind the Company in any way I saw fit. I have the full authority to hire and fire employees as I see fit, and to contractually bind the corporation.

An organizational chart was also submitted, which indicated that the petitioner employed four persons in addition to the beneficiary: an operational manager, two shift operators, and a floor assistant. The petitioner did not clarify if these employees were based in New Jersey, Georgia, or both.

On January 6, 2005, the director requested additional evidence. Specifically, the director requested more specific information with regard to the executive duties of the beneficiary, as well as a statement outlining the staffing of the organization. In particular, the director asked for clarification as to which office employed the persons named on the organizational chart, and further requested additional information regarding the positions and job duties.

In a response dated April 5, 2005, counsel for the petitioner submitted a letter addressing the director's queries. Counsel confirmed that the employees listed on the organizational chart were employed at the New Jersey office. With regard to the Georgia office, however, the petitioner claimed that it employed the beneficiary and [redacted] as assistant manager in this office. The AAO notes from its review of the record, however, that [redacted] is listed as a shift operator on the New Jersey office's organizational chart.

On June 9, 2005, the director denied the petition. The director determined that the totality of the evidence failed to establish that the beneficiary had acted in a primarily managerial or executive capacity during the previous two years, and specifically noted that the employment situation, as discussed in the record, was not credible based on the actual duties of his subordinate employee in Georgia.

On appeal, counsel for the petitioner claims that as the chief executive officer, the beneficiary is primarily engaged in both managerial and executive duties, and that by virtue of being in charge of investments for the petitioner and the Georgia affiliate, he qualifies for the benefit sought.

A critical analysis of the nature of the petitioner's business undermines counsel's assertion that the beneficiary is primarily engaged in both managerial and executive duties. First, the proposed nature of the beneficiary's role in the United States is unclear, since he apparently is rendering his services simultaneously to two different corporations in two different states. The I-129 extension request indicates that he will primarily be employed in the Atlanta, Georgia office, which is a branch of the New Jersey-based petitioner. The extension request further indicates that the beneficiary will be supported in Georgia by one assistant manager. This assistant manager, however, is listed as a shift operator for the New Jersey entity as well as the manager of a

Kentucky Fried Chicken (KFC) restaurant acquired by the Georgia office through its investment in Patel Chicken, LLC. Assuming, therefore, that the duty stations of the beneficiary and the assistant manager are at different locations in Georgia, it appears that no other employees work with the beneficiary at the petitioner's Georgia office, thereby raising questions with regard to the exact nature of the beneficiary's role as its chief executive officer.

The petitioner indicates that the beneficiary performs investment related services. However, considering that the Georgia office has designated the beneficiary's only subordinate employee to manage the KFC restaurant, there is no one to relieve the beneficiary from performing non-qualifying duties at the petitioner's Georgia office. Rather, it appears from the record that the beneficiary must be engaged in the day-to-day operations of this entity, specifically since the only other person working for the petitioner in Georgia is managing the KFC restaurant, not the petitioner's branch office. Since the record suggests that the beneficiary does not actually work in the KFC restaurant since it is merely an investment property, it stands to reason that the beneficiary is working alone in an entity separate and apart from KFC. It remains unclear, therefore, how the petitioner's corporation in Georgia can support the beneficiary in a primarily managerial and executive capacity without any support staff working on site with him. It can only be assumed, and has not been proven otherwise, that the beneficiary is performing all other functions associated with the running of a business in the Georgia office.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.* Based on the record of proceeding, it appears that the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The same analysis can be applied to the beneficiary's employment in the New Jersey office as well. The petitioner claims that the New Jersey corporation operates a convenience store, and employs two shift operators, an operational manager, and a floor assistant. As touched upon above, one of the shift operators, Bharat Patel, is employed in Georgia as the assistant manager of the KFC franchise. Therefore, it appears that only three persons are left to operate the convenience store in New Jersey. Presuming that the store is open 7 days a week with extended hours, it is unlikely that three employees can handle all the operational tasks necessary to ensure the continued operation of such a business. Even though the petitioner claims that the beneficiary does not engage in non-qualifying duties and directs only the investments of the petitioner, it does not claim to have anyone on its staff to perform these non-qualifying tasks such as clerical work, bookkeeping, administrative functions, and of course maintaining the inventory for the store. Thus, it seems evident that the beneficiary himself is performing some of these non-qualifying duties. Regardless, the AAO

is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. 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. 582, 591 (BIA 1988). If the beneficiary is performing administrative functions, the AAO again notes that an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604.

Furthermore, the description of the beneficiary's actual duties is too vague to ascertain the exact nature of his role in the organization and, most importantly, in which office he primarily spends his time. Despite the director's specific request for the petitioner to provide a detailed discussion of the beneficiary's role in the United States as an executive, the petitioner failed to thoroughly respond to the director's request. As such, the record contains little information with regard to the exact nature of the beneficiary's duties.

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner continually asserts that the beneficiary's time is spent on discretionary, managerial and executive duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In the instant matter, the petitioner has not established that it can employ the beneficiary in a predominantly managerial or executive position as required by 8 C.F.R. § 214.2(l)(3). For this reason, the petition may not be approved.

Beyond the decision of the director, the record does not contain sufficient evidence that a qualifying relationship exists between the foreign entity and a U.S. office. The petitioner claims that the beneficiary is the sole owner of the foreign entity. However, corporate records submitted with the petition indicate that the foreign entity is a partnership with two owners, the beneficiary and [redacted] The New Jersey corporation, the initial petitioner in this matter, is owned by three persons, namely, the beneficiary (50%), [redacted] (25%), and [redacted] (25%). Therefore, absent clear and non-conflicting evidence of the actual ownership of the foreign entity, the entities cannot be found to be affiliates.

Furthermore, there is no evidence in the record of the ownership of the Georgia corporation. 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; *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.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder 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 must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, 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., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, the mere assertions of counsel, without supporting documentation, are insufficient to establish this crucial factor for eligibility. 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. For this additional reason, the petition may not 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 she shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.