U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

File: EAC 07 037 50927 Office: VERMONT SERVICE CENTER Date: AUG 12 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa and affirmed his decision on a subsequent motion to reopen. Subsequently, the petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the petitioner's motion and affirm its previous decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary among its managerial staff 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).[1] The petitioner is a corporation organized in the State of Texas, which claims to be an affiliate of the beneficiary's foreign employer located in Mexico. The petitioner states that it imports, exports and distributes industrial equipment and provides various industry-related services. The petitioner seeks to employ the beneficiary for a period of three years.

The director denied the petition based on the determination that the petitioner failed to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. The AAO dismissed the petitioner's subsequent appeal, in a decision dated October 2, 2008. In the decision, the AAO noted certain flaws in the director's underlying analysis of the issue, but ultimately concurred with the director's conclusion that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The AAO's conclusion was based upon the petitioner's failure to provide a comprehensive and sufficiently detailed description of the beneficiary's proposed tasks, the petitioner's inconsistent statements regarding the staffing levels of the U.S. company, and a lack of documentary evidence to corroborate the employment of the beneficiary's proposed subordinates. Beyond the decision of the director, the AAO further determined that the petitioner failed to establish that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. In reaching this determination, the AAO noted that the record contained no description of the beneficiary's position with the foreign entity.

On motion, counsel for the petitioner submits additional evidence to address the new issues raised in the AAO's decision, specifically, the perceived discrepancies in the petitioner's stated staffing levels, and the beneficiary's employment capacity with the foreign entity. As the AAO's decision dated October 2, 2008 was based substantially on evidentiary deficiencies that were not addressed in either of the director's decisions, the motion will be granted.

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

---

[1] The record is inconsistent as to the job title of the beneficiary's proposed position with the U.S. entity. The petitioner indicated at Part 5, Item #1 on Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary will be employed in the United States as a logistics manager. However, the letter submitted in support of the Form I-129, dated November 21, 2006, indicates that the beneficiary would be employed in the United States in the position of general manager, whose responsibility it would be to oversee the work of three managerial employees, including the logistics manager.

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.

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.

The first issue to be addressed is whether the United States entity would employ the beneficiary in a managerial or executive capacity, where the beneficiary's time would be primarily spent performing duties of a qualifying nature.

The AAO dismissed the petitioner's appeal, in large part, based on unresolved discrepancies in the petitioner's statements regarding the staffing of the U.S. company and the beneficiary's level of authority within the company's organizational structure. Specifically, the AAO emphasized that the record contained inconsistencies regarding the beneficiary's job title, the number of direct subordinates the beneficiary would manage, and inconsistencies regarding the total number of employees working for the company.

The petitioner filed the nonimmigrant petition on November 22, 2006. The petitioner stated on Form I-129, Petition for a Nonimmigrant Worker, that the petitioner employs 17 workers, and that the beneficiary would serve as "logistics manager" responsible for supervising two managers and managing the "shipping and documentation functions.

In a letter dated November 21, 2006, the petitioner's vice president, [redacted], stated that the beneficiary would serve as "general manager" of the U.S. company, responsible for supervising three managers, including the sales manager, the logistics manager and the accounts manager. In support of the petition, the petitioner provided an organizational chart for the U.S. company depicting a total of 13 employees, including the beneficiary. The chart indicated that the beneficiary would serve as general manager, and would directly supervise the accounting manager, sales manager and logistics manager, and indirectly supervise the seven employees who report to these employees.

On appeal, counsel asserted that the petitioner has 15 full-time employees, including four managers whose work the beneficiary would directly oversee. The petitioner submitted a new organizational chart indicating that the beneficiary would be supervising a sales manager located in Mexico in addition to the three managers previously identified.

In dismissing the petitioner's appeal, the AAO emphasized that the petitioner had made three different assertions regarding the number of employees to be supervised and the total number of employees working for the company, yet provided no documentation establishing which, if any, of these assertions was factually accurate. The AAO noted that the record contained no evidence documenting the employment of the employees named in either of the organizational charts submitted.

On motion, counsel submits a statement on Form I-290B, Notice of Appeal or Motion, in which he seeks to explain the discrepancies discussed in the AAO's decision:

> An issue was raised about the number of employees of the petitioner. It depends on how they are counted. Please note the following permutations:
>
> Number of employees of the U.S. company who currently work in the U.S. – 12
> Number of employees of the U.S. company plus those in Mexico who are paid by the U.S. company and would be supervised by the beneficiary – 15
> Number of employees of the U.S. company who currently work in the U.S. plus the 1099 workers – 14
> Number of employees in the U.S. company who currently work in the U.S. plus the 1099 workers plus those in Mexico who are paid by the U.S. company & would be supervised by the beneficiary – 17
>
> If [the beneficiary] is added as a prospective employee, then the numbers are increased by 1. So, the variation in the number of employees given in the petition and other documents is understandable.

With respect to the inconsistencies in the record regarding the number of managers the beneficiary would supervise, counsel states that the petitioner's statement on the Form I-129 petition, indicating that the beneficiary would supervise two managers, was a typographical error. Counsel states that the petitioner originally intended for the beneficiary to supervise three managers, and later decided that he would also supervise the additional manager located in Mexico. In this regard, counsel asserts that "this petition was filed almost two years ago and things do change over time."

The petitioner provides the dates of hire for the four managers proposed to work under the beneficiary's supervision, including [redacted] (sales manager), [redacted] (logistics manager), [redacted] (accounting manager), and [redacted] (sales manager, Mexico). The petitioner indicated that all of these employees were working for the petitioner prior to the date of filing. The petitioner also submits copies of IRS Forms W-2, Wage and Tax Statement, issued by the company in 2006 and 2007.

The evidence submitted shows that the petitioner paid a total of 22 employees in 2007 and 30 employees in 2006. The AAO notes that there are employees who received wages in both years who did not appear on either of the submitted organizational charts. More importantly, there is no evidence of any wages paid to [redacted], the logistics manager, or to [redacted], who was initially identified as a sales representative, and now identified as the sales manager who would report to the beneficiary. Although the

petitioner indicates that the beneficiary will supervise Mexican employees who are paid by the U.S. company, there is also no evidence of wages paid to these employees, nor do they appear on the organizational chart for the petitioner's Mexican affiliate. Absent evidence of wages paid to the beneficiary's direct subordinates, the petitioner's claim that the beneficiary will supervise two to four managerial employees is not supported by 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, counsel's explanation regarding the discrepancy in the number of reported employees is not persuasive. Counsel claims that the 17 employees indicated on the Form I-129 included employees working in Mexico who would be supervised by the beneficiary and paid by the U.S. company. However, the petitioner did not indicate at the time of filing that the beneficiary would supervise Mexican-based employees, and counsel states that this decision to assign this responsibility to the beneficiary was made by the company at a later date. In light of counsel's statement, there is no reason to assume that the petitioner would have included three Mexican workers in its employee count when completing this item on Form I-129. The AAO notes that the best evidence of the actual staffing of the company as of the date the petition was filed in November 2006 would be the petitioner's state quarterly wage report and IRS Form 941, Employer's Quarterly Federal Tax Return, for the last quarter of 2006. The petitioner has not provided this evidence, and the AAO cannot determine which of the 30 employees who received Forms W-2 in 2006 were employed at the time the petition was filed.

The AAO acknowledges that the petitioner has submitted an expanded description of the beneficiary's proposed duties as general manager on motion. However, given the discrepancies that remain in the record regarding the employment status of the beneficiary's claimed subordinates, the AAO finds the new evidence insufficient to overcome its previous determination, particularly as the description indicates that the beneficiary accomplishes his objectives, in part, through the supervision of the subordinate managers. In addition, the description indicates that many of the beneficiary's duties would be performed on only a monthly, bi-weekly or weekly basis, making it difficult to discern what he would primarily do on a daily basis. The duties that occur daily include analyzing sales inquiries, making purchasing decisions, checking and authorizing all sales orders, revising invoices, and checking and approving purchase orders, duties that do not clearly rise to the level of managerial or executive duties, particularly in light of the petitioner's failure to document the employment of members of its subordinate managerial staff in the sales and logistics functions. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties would be managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Finally, the AAO notes that the petitioner's initial statement on Form I-129 that the beneficiary will serve in the position of "logistics manager" responsible for "management of all shipping and documentation functions," has not been adequately resolved. Counsel indicates on motion that the statement on Form I-129 that the beneficiary would supervise only two managers was a "typographical error"; however, the petitioner has not addressed why it indicated an entirely different job title and job description on the Form I-129. 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. at 591-92.

In light of the foregoing discussion, the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. The petitioner has not submitted evidence on motion sufficient to overcome the prior determination made by the AAO.

The second issue to be addressed in this proceeding is whether the petitioner established that the beneficiary was employed by the foreign entity in a primarily managerial or executive capacity. In support of the petition, the petitioner provided an organizational chart for the foreign entity indicating that the beneficiary was employed as director of operations, responsible for supervising three subordinate departmental managers and their staff. However, in dismissing the appeal, the AAO emphasized that the petitioner had failed to provide a description of the job duties performed by the beneficiary during his employment abroad. Without this crucial information, the AAO could not conclude that the petitioner met the requirement specified in 8 C.F.R. § 214.2(l)(3)(iv), and therefore denied the petition for this additional reason.

On motion, the foreign entity provides a description for the position of "general manager" and indicates that the beneficiary has held this role from 2006-2008. According to the description, the general manager is responsible for overseeing the warehouse, sales and administration functions of the company. At the same time, the petitioner submits the previously provided organizational chart depicting the beneficiary as director of operations overseeing the sales, logistics and accounting departments. The petitioner has not explained the discrepancy in the beneficiary's job title, and the AAO is left to question whether the beneficiary assumed a different position with the foreign entity subsequent to the filing of the petition in November 2006. Again, 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. at 591-92. The petitioner previously indicated that the beneficiary assumed the position of director of operations in October 2005, and therefore, it must submit a description of the duties he performed in this position sufficient to establish that his employment was in a primarily managerial or executive capacity. The current record does not contain a detailed description of the director of operations position. Accordingly, the petitioner has not submitted evidence on motion to overcome the AAO's prior determination.

Furthermore, upon review, the AAO notes that the petitioner also failed to establish that the beneficiary 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. *See* 8 C.F.R. § 214.2(l)(3)(iii).

The evidence of record indicates that the beneficiary was hired by the foreign entity on or about October 3, 2005. The petitioner indicated on Form I-129 that the beneficiary has been physically present in the United States since August 28, 2006 in B-1 status as a nonimmigrant visitor.

The regulation at 8 C.F.R. § 214.2(l)(ii)(A) states, in pertinent part:

> Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

Accordingly, the beneficiary, as of the date of filing, had less than 11 months of continuous employment abroad with the petitioner's claimed affiliate. The time the beneficiary spent in the United States as a visitor between August 28, 2006 and the date the petition was filed on November 22, 2006, does not count towards fulfillment of this regulatory requirement. For this additional reason, the petition cannot be approved.

Finally, the AAO finds insufficient evidence to establish the existence of a qualifying relationship between the petitioner and the foreign entity. 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 petitioner claims to be an affiliate of the Mexican company, Jersey Controls, S.A. de C.V., and states that both companies are wholly-owned and controlled by the same individual, [redacted] In support of the petition, the petitioner submitted a Sale and Purchase Agreement dated June 18, 2004, between [redacted] and Tubo & Acero de Monterrey S.A. de C.V., wherein [redacted] agreed to purchase the assets of the petitioning company at a price of $380,000. The petitioner also submitted a copy of its 2006 IRS Form 1120, U.S. Corporation Income Tax Return, wherein [redacted] is identified as the sole shareholder of the company.

With respect to the foreign entity, the petitioner submitted an un-translated copy of Jersey Controls' 2005 *Declaracion Annual,* an un-translated copy of the foreign entity's *Formulario Registro* dated April 22, 2002, and copies of recent invoices and bank statements, but no documentation that would establish who owns and controls the company. 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

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, USCIS is unable to determine the elements of ownership and control.

As the record as presently constituted contains no corroborating evidence of the ownership of the foreign entity and minimal evidence documenting the ownership of the U.S. entity, the petitioner has not substantiated its claim to have an affiliate relationship with the foreign entity. 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). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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 of proving eligibility for the benefit sought remains entirely with the petitioner. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the AAO will affirm its previous decision.

ORDER: The AAO's decision dated October 2, 2008 is affirmed.