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U.S. Citizenship
and Immigration
Services

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File: SRC 04 178 51704 Office: TEXAS SERVICE CENTER Date: DEC 22 2005

IN RE: Petitioner:
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)

IN BEHALF OF PETITIONER:



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, Director
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 seeks to extend the employment of the beneficiary 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 U.S. petitioner, a corporation organized in the State of California that is described as a retailer of electronic testing and measuring equipment tools, seeks to employ the beneficiary as its general manager. The petitioner claims that it is the subsidiary of Macrotest Ingenieros, S.A., located in San Borja, Peru.

The director denied the petition, determining that the petitioner had failed to establish that (1) the beneficiary would be employed in a managerial or executive capacity; or (2) the petitioner and the organization which employed the beneficiary abroad were qualifying organizations.

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 submits a brief which seeks to clarify the petitioner's relationship with the foreign entity and the beneficiary's position while employed in the United States.

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)(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 first issue in this matter is whether the beneficiary will be employed in a capacity that is primarily managerial or executive as required by 8 C.F.R. § 214.2(l)(3)(iv).

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.

In the initial petition, the petitioner submitted three brief descriptions on supplements to the Form I-129. As a non-technical description of the beneficiary's duties, the petitioner stated that he "oversee[s] day to day organization scheduling and implementation of operations. Participate in formulating policies for future developments." With regard to the beneficiary's duties during the past three years, the petitioner stated:

Since June 2003 [the beneficiary] has worked as a [g]eneral [m]anager [for the petitioner]. He managed day to day operations of the company. He participated in formulating policies for future developments. He negotiated contracts, analyzed financial and operation reports to determine requirements for increasing profits.

Finally, with regard to the beneficiary's proposed duties in the future, the petitioner stated that "[the beneficiary] will review and analyze expenditure, financial and operation reports to determine requirements for increasing profits. Also [the beneficiary] will manage the day[-]to[-]day operation of the company and he will negotiate contract[s] with equipment and materials suppliers."

The director found this initial description of the beneficiary's duties insufficient and consequently issued a request for evidence on June 17, 2004. The request required the petitioner to submit an organizational chart for the U.S entity which showed the beneficiary's position in the organizational hierarchy as well as all employees under the beneficiary's supervision. In addition, the director requested a more detailed description of the beneficiary's duties as well as quarterly wage reports and a payroll summary verifying the employees of other persons.

In response, the petitioner submitted a document entitled "organizational chart" but which was merely a list of the petitioner's two shareholders. Furthermore, no detailed description of the beneficiary's duties was provided. Although quarterly wage reports for the quarters ending December 31, 2003, March 31, 2004 and June 30, 2004 were submitted, the attachments were incomplete and based on the limited information

provided, it appears that the beneficiary was the petitioner's only employee during the first two quarters of 2004.

On September 29, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the beneficiary was performing the tasks necessary to provide the petitioner's goods and/or services and that it had not been demonstrated that the beneficiary was managing an essential function.

On appeal, counsel for the petitioner contends that the beneficiary as general manager is in fact a managerial employee and that he functions at a senior level within the organization. In addition, counsel states that the evidence provided to date was sufficient to establish that the beneficiary will act in a managerial capacity.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See §§ 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a manager or executive by virtue of his position title and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed managerial/executive duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In the request for evidence, the director specifically asked for additional details regarding the beneficiary's duties, his subordinate employees, and the organizational hierarchy of the petitioner. Clearly, therefore, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence, and therefore the minimal information and vague description of the petitioner's operations and the beneficiary's duties therein make it impossible to thoroughly analyze the beneficiary's qualifications as a manager or executive. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel restates that the beneficiary is a qualified manager or executive by virtue of his position title of general manager. Counsel further contends that the evidence contained in the record is sufficient to establish this claim. Counsel's position, however, is not supported by evidence to corroborate such claims. 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). 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)).

Finally, the AAO notes that although counsel claims on appeal that the beneficiary supervises four employees, the employment records submitted in response to the request for evidence indicate only one employee in 2004, which appears to be the beneficiary. Consequently, the petitioner's claim that the beneficiary oversees a subordinate staff is not supported by independent evidence, and thus cannot be considered in this matter. As previously discussed, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

In reviewing the brief description of the beneficiary's duties, it is evident that the beneficiary is responsible for generating the petitioner's goods and services. 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). For this reason and for the reasons set forth above, the AAO concludes that the beneficiary will not be primarily employed as a manager or executive. Therefore, the petition may not be approved.

The second issue in the present matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term "qualifying organization" as 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; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

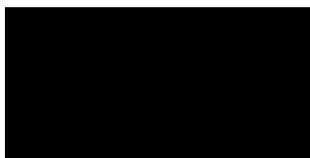
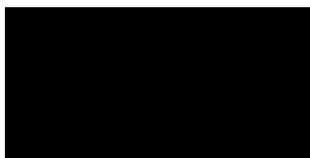
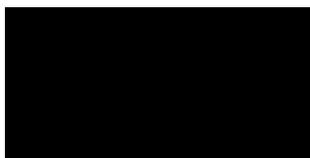
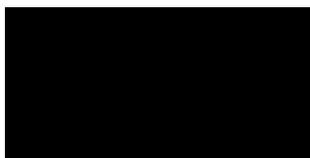
- (I) "Parent" means a firm, corporation, or other legal entity which has subsidiaries.
- (J) "Branch" means an operating division or office of the same organization housed in a different location.
- (K) "Subsidiary" means a firm, corporation, or other legal entity of which a parent owns, directly or 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, or
- (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

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 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*, 19 I&N Dec. at 595.

In this case, the petitioner claims that the U.S. entity is the subsidiary of the foreign entity. However, the petitioner has provided numerous forms of conflicting evidence with regard to the ownership of the U.S. petitioner.

On Form I-129, the petitioner indicated that the foreign entity was owned as follows:

	51%
	38%
	30%
	30%

As noted by the director, this percentage totaled an erroneous 149%. With regard to the petitioner, the statement on Form I-129 indicated that its ownership was as follows:

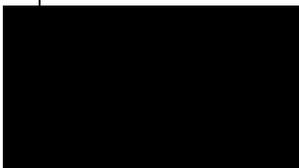


51%
49%

The petitioner also submitted shares certificates for the petitioner which, on their face, appeared to corroborate this ownership claim.¹ However, the petitioner's 2002 U.S. Corporation Income Tax Return, prepared and signed on November 10, 2003, indicated on Schedule K and on Form 5472 that Diogenes Rios owned 100% of the U.S. petitioner.

The director issued a request for additional evidence, which included a request for the petitioner's Articles of Incorporation. In a response dated September 13, 2004, the petitioner submitted the requested documentation. The Articles of Incorporation, recorded on September 5, 2001, indicate that the ownership distribution of the petitioner were divided equally between [REDACTED] (50%) and [REDACTED] (50%). However, the share certificates, also dated September 5, 2001, indicate that the ownership of the petitioner is designated as 51% to [REDACTED] and 49% to [REDACTED]. Interestingly, these certificates, issued the same day as the recording of the Articles of Incorporation with the Secretary of State, are numbered 3 and 4. There is no discussion of certificates 1 and 2.

The director denied the petitioner based on the discrepancies in the record, and specifically cited to the petitioner's inaccurate listing of the foreign entity's ownership percentages. On appeal, counsel for the petitioner merely acknowledges a clerical error in the presentation of the shareholders and their ownership interests, and attempts to clarify this issue. Specifically, counsel stated that 20,000 shares are outstanding in the foreign entity, and that the breakdown of shares is as follows:



10,200 shares
3,800 shares
3,000 shares
3,000 shares

Counsel provided no further discussion with regard to the major discrepancies in the petitioner's ownership.

Upon review, the petitioner has not established that the U.S. and foreign entities are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G).

Specifically, the statute requires that the beneficiary come to the United States to "render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." § 203(b)(1)(C) of the Act. Critical to its claimed eligibility, the petitioner asserts that the U.S. corporation is the subsidiary of Macrotest Ingenieros, S.A., based on the similar ownership interests of one individual out of the two distinct groups of owners.

¹ It is noted for the record that technically the share certificates only indicate the ownership percentage and not the number of shares issued.

In this case, there are far too many discrepancies and contradictory forms of evidence to permit a definite finding of ownership in this matter. The ownership of the U.S. petitioner is contradicted in three separate documents: the most recent being its 2002 tax return signed on November 10, 2003 which claims that the petitioner has only one owner, whereas counsel continually alleges throughout these proceedings that ownership of the petitioner is at a 51/49 percent ratio. Most significantly, the Articles of Incorporation indicate that the petitioner is owned equally by two parties.

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 (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. *Id.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In this matter, the AAO concurs with the director's decision. The record of proceeding is devoid of credible evidence that would establish the ownership interests in each of the entities in question. Without this fundamental evidence, the AAO is precluded from examining the control of the entities and thus the overall relationship between these two companies.² 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 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).

² The AAO notes that if any relationship existed between the two entities, it would hinge on the ownership and control interests of [REDACTED]. It appears that the foreign entity is owned in its majority by Mr. [REDACTED] and the evidence in the record pertaining to the U.S. petitioner also suggests that its majority shareholder may in fact be [REDACTED]. If this were established by credible evidence pertaining to both entities, it is possible that a qualifying relationship may exist between the parties by way of Mr. [REDACTED] common ownership and control of the entities. However, since the record lacks evidence to support this contention, the AAO is precluded from concluding that it is more likely than not that a qualifying relationship exists between the two entities.

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.