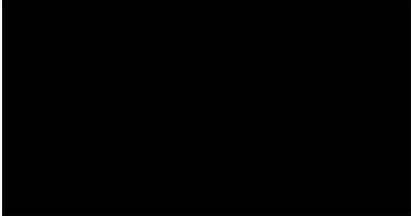


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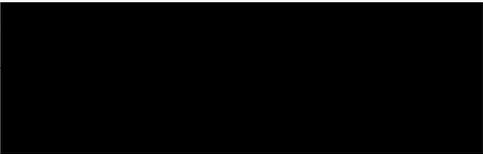
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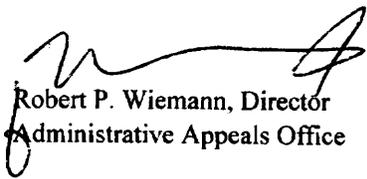
IN RE: Petitioner: 
Beneficiary

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)

ON 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 nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, [REDACTED], claims to be a branch of [REDACTED]¹ located in Australia. The petitioner plans to operate an entertainment business. The U.S. entity was incorporated in the State of Nevada on September 7, 2000. The petitioner seeks to hire the beneficiary as a new employee to open its U.S. office.² Accordingly, on October 25, 2002 the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager for one year. The petitioner endeavors to employ the beneficiary's services as the U.S. entity's executive director.

On March 12, 2003, the director denied the petition. The director determined that the petitioner failed to establish a qualifying relationship between the U.S. and foreign companies and that the beneficiary will be employed in a primarily managerial or executive capacity.

On appeal, the petitioner's counsel submits a brief and claims that the beneficiary "meets the definition of executive" and that "the petitioner and Cross Promotions clearly meet the qualifications of an existing relationship."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

Pursuant to 8 C.F.R. § 214.2(l)(3), 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.

¹ The petitioner listed [REDACTED] on the Form I-129 as the name of the beneficiary's employer abroad. However, in a letter submitted in support of the petition, the petitioner indicated that the foreign entity, [REDACTED] located in Australia, was the beneficiary's employer for the past 10 years.

² The AAO notes that the petitioner filed for L-1A classification for the beneficiary on October 25, 2002. As a result, the director indirectly stated that because the petitioner was established on September 7, 2000, the director did not consider the petitioner to be a new office. However, the record establishes that the petitioner had been doing business for less than one year although it was incorporated on September 7, 2000. Therefore, the AAO will evaluate this petition as involving a new office.

(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's prior year of employment abroad 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.

(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.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, 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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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 in this proceeding is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity within one year.

In an October 5, 2002 offer of employment letter and in the business plan, the petitioner described the beneficiary's duties as:

Co-ordinate contracts with CEO/President of the Company

Manager of leasing housing and utilities for All performers

Hiring/dismissal of all staff

Financial Controller (United States of America and Australia)

Costumes/ Purchasing-Co-ordinates with designer for costuming and props

Staging, dealing with any and all special and unique requirements

Organize tours throughout United States of America and other Countries

In addition, the petitioner submitted a checklist of the beneficiary's daily duties. In the response to the request for additional evidence, the beneficiary was described as being promoted to executive director in October 2002 and her proposed U.S. duties were stated as:

The person in the position must be very familiar with production, and have the ability to handle the demands of the show in the United States as well as communication with the operations in Australia.

A lower level manager or executive was not selected for this position because the director must deal with multi million dollar companies and contracts. [The beneficiary] possesses the ability and unique expertise in this area. She is highly regarded by her co-workers as well as both CEO's [sic]. . . .

And because of her ability to work in all capacities and departments of the production in the United States[,] [s]he is an asset to both CEO's [sic] and to the show.

The petitioner also provided an example of the beneficiary's eight-hour-day schedule. This day included four hours involved in "[d]aily dealings with the [redacted] business ticket sales and promotions" and dealing with "accounts and other outside promotional activities," two hours involved in "[d]ealing with other venues throughout Canada and USA," one hour involved with "[c]ontracts, organizing all products that are needed. Promotional Material photos, written stories," and one hour in "[a]ny financial dealings in regards of the show - [p]urchases."

On March 12, 2003, the director denied the petition. The director determined that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director found that the beneficiary would be "the sole employee performing the operational duties of the organization with no one to relieve her from performing the non-managerial or non-executive duties."

On appeal, the petitioner's counsel claims that the beneficiary "meets the definition of executive." Counsel claims that the beneficiary's "duties and responsibilities as listed is [sic] to plan, organize, all aspects of the performance, from contracts to staging requirements at various venues, directs and controls personnel who perform." Counsel also claims that the "end product of the entertainment field is the performance itself and such requires an executive to direct all aspects of this function."

In evaluating a new office petition, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility

cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

On review, the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year. The beneficiary's job description lacks specificity and is vague. The petitioner described the beneficiary's duties as "[c]o-ordinate contracts," "[f]inancial [c]ontroller," "[o]rganize tours," "[d]aily dealings," "plan," and "organize." The beneficiary's described duties do not clearly indicate what specific duties the beneficiary will primarily perform. It is unclear how the beneficiary will coordinate contracts, serve as a financial controller, plan, organize tours, and what daily dealings the beneficiary will handle. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner also described the beneficiary as having the "ability to work in all capacities and departments of the production in the United States. She is an asset to both CEO's and to the show." However, the petitioner failed to describe how exactly the beneficiary is an asset in relation to serving in a primarily managerial or executive capacity within one year. The AAO acknowledges that the beneficiary may perform some non-managerial or non-executive tasks during the first year of operation; however, the petitioner must specifically identify the beneficiary's duties in order for the AAO to evaluate whether the organization will support a managerial or executive within one year of operation. Specifics are clearly an important indication of whether a beneficiary's duties will be 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 this matter, it is unclear whether the beneficiary will reach the level necessary to primarily perform managerial or executive duties because of the lack of specificity in the job duties and role the beneficiary will represent within the U.S. company.

In addition, the AAO notes that although the petitioner claimed on the Form I-129 that the U.S. company employed two workers, the petitioner's U.S. organizational chart indicated that there were eight additional employees. 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).

Moreover, in examining the business plan, a CIS precedent decision lists possible criteria for establishing an acceptable business plan. *Matter of Ho*, 22 I&N Dec. 206, 213 (Comm. 1998). According to the decision, "The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions." The decision concluded, "Most importantly, the business plan must be credible." *Id.* at 213. Although *Matter of Ho* addresses the specific requirements for the immigrant investor visa

classification as set forth at section 203(b)(5) of the Act, the decision's discussion of the business plan requirements is instructive for the L-1A new office requirements. Here, the business plan lacks specificity. For example, the petitioner stated that the beneficiary "has the authority to decide the direction of the show with briefing the CEO's of any and all changes taking place that also includes marketing, recruitment, dismissal and public relations." However, this description fails to reveal sufficient detail describing exactly what the beneficiary's duties will entail. In sum, the petitioner has failed to clearly establish the proposed nature of the office and describe the scope of the entity and its organizational structure. Thus, given the business plan's generalities and lack of applicable information, it cannot demonstrate whether the new office will support a manager or executive within one year of filing this petition.

Finally, the term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead will be primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). Here, the petitioner claims that the beneficiary's proposed duties include managing an essential function, i.e., "the stage performance." However, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties that will be attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary will manage the function rather than perform the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function.

In sum, the AAO concludes that the petitioner failed to establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year of the approval of the petition. For this reason, the petition may not be approved.

The second issue in this proceeding is whether a qualifying relationship exists between the petitioner and the foreign entity. The regulation at 8 C.F.R. 214.2(l)(ii) provides:

(G) *Qualifying organization* means 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.

(H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operation 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.

The regulation and case law confirm that ownership and control are factors that must be examined in determining whether a qualifying relationship exists between the petitioner and foreign organization. *See 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) (in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (in nonimmigrant visa proceedings). In the context of this visa proceeding, ownership refers to the direct or indirect legal right of possession of the assets of an organization with full power and authority to control. *Matter of Church Scientology International*, 19 I&N Dec. at 595. Control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an organization. *Id.*

On the Form I-129, the petitioner stated that the petitioner is a branch of the foreign entity. The petitioner described the stock ownership as "Billy Cross 100% of Australian Company, 50% of USA Company" and "Adam Steck 50% of USA Company." On December 11, 2002, the director requested additional evidence. In particular, the director requested evidence showing the ownership and control of the United States and foreign entities. The director requested a copy of the foreign entity's annual report and list of owners, and the U.S. entity's list of owners and clarification establishing whether the U.S. entity is a branch, subsidiary, or joint venture.

In response, the petitioner submitted a copy of the foreign and U.S. entity's financial and bank statements, its articles of incorporation, and a copy of its stock certificate.

On March 12, 2003, the director denied the petition. The director determined that the petitioner failed to establish that the U.S. entity had a qualifying relationship with the foreign entity. The director noted, "there

is no evidence provided of a wire transfer or cancelled checks to indicate that the funds originated from the foreign entity for the purchase of the petitioner's stock."

On appeal, the petitioner's counsel claims that "the petitioner and [redacted] clearly meet the qualifications of an existing relationship." Counsel references a document titled "Memorandum of Understanding," and claims that the "amount of stock sold to [the foreign entity]" establishes that "the petitioner is a branch." Counsel also asserts that based upon the petitioner's bank statements, the foreign entity "receives a percentage of the revenues generated by Thunder From Down Under."

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). On review, the petitioner submitted insufficient evidence to establish that there is a qualifying relationship between the petitioner and foreign entity. Although the petitioner submitted a copy of its articles of incorporation and claimed that [redacted] owned 100 percent of the foreign entity and 50 percent of the U.S. company, and that [redacted] 50 percent of the United States company," there was no evidence to establish that the stock was actually distributed and paid for by the foreign company. The petitioner did not submit wire transfers, its stock ledger, or other pertinent evidence showing that money was actually paid for the shares of stock. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, counsel reiterated that the petitioner is a branch of the foreign company. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(I)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(I)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as “an . . . office of the same organization housed in a different location,” as that corporation is a distinct legal entity separate and apart from the foreign organization. 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). If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. Here, the petitioner established that it was incorporated on September 7, 2000 in the State of Nevada and therefore, contrary to what counsel claims, it is not a branch of the foreign entity. As previously stated, in examining whether the petitioner qualifies as a subsidiary of the foreign entity, the petitioner failed to establish the ownership and control of the U.S. company.

After careful consideration of the evidence, it is concluded that the petitioner failed to establish that a qualifying relationship exists between the U.S. and foreign organizations. For this reason, the petition may not be approved.

Although not explicitly addressed in the decision, the record contains no documentation to persuade the AAO that the beneficiary has been employed abroad in a managerial or executive capacity as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). The petitioner provided a vague description of the beneficiary’s foreign duties that fails to indicate what duties the beneficiary primarily performed. For example, in the response to the request for additional evidence, the petitioner described the beneficiary as the “[t]our [m]anager/ [f]inancial [c]ontroller” responsible in part for “[p]ublicity, [d]ealing with contracts, and [d]ealing with all department heads of [v]enues where production was scheduled to appear.” However, these duties fail to indicate how the beneficiary primarily acted as an executive or manager for the foreign entity. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. at 190. 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).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.