



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D7

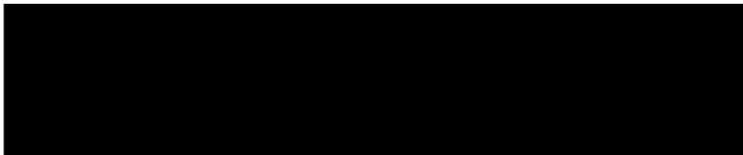
File: EAC 04 110 53756 Office: VERMONT SERVICE CENTER Date: APR 03 2006

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, Vermont 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 president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New Jersey corporation, claims to be the subsidiary of [REDACTED] located in Istanbul, Turkey, and is an advertising and marketing firm. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that (1) the petitioner had a qualifying relationship with a foreign entity; or that (2) the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner asserts that the director erred as a matter of law and fact, and that contrary to the director's findings, the petitioner had in fact submitted sufficient evidence to establish its eligibility. In support of this contention, counsel submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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 management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The first 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.

In this case, the petitioner claims that the foreign entity owns the U.S. entity and, thus, they maintain a parent-subsidiary relationship.

The director found the initial evidence submitted with the petition to be insufficient to qualify the petitioner for the benefit sought and consequently issued a request for evidence on March 16, 2004. In the notice, the director specifically required the petitioner to submit a sampling of the foreign entity's sales transactions as evidence that it was still doing business abroad as required by the regulations. In her June 10, 2004 response, counsel for the petitioner submitted the articles of incorporation, U.S. Corporation Income Tax Return for 2003, and copies of sales invoices for the U.S. petitioner only.

The director subsequently denied the petition, concluding that the petitioner's claim of a qualifying relationship was invalid since the petitioner had failed to establish that the foreign entity was still a viable company and thus a qualifying organization. Counsel appealed, yet provided the same insufficient evidence previously submitted.

Upon review, the AAO concurs with the director's decision. Despite the director's specific request for evidence pertaining to the foreign entity's business dealings, the petitioner failed and/or refused to submit

such evidence. 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). Consequently, the director correctly based the denial on the information contained in the record of proceeding when determining whether the foreign entity was still a qualifying organization.

Upon review of the record of proceeding prior to adjudication, it is clear that the petitioner failed to establish that the foreign entity met the criteria set forth for a qualifying organization in 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the term "qualifying organization" is defined in part as an organization that "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." See 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Furthermore, the regulation at 8 C.F.R. §214.2(l)(1)(ii)(H) defines the term "doing business" as "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."

On appeal, counsel for the petitioner merely alleges that the petitioner "submitted volumes of evidence" to establish the petitioner's business operations in the United States. However, the basis for the denial is whether the *foreign entity*, not the petitioner, is continuing to do business during the alien's stay in the United States. Despite counsel's assertions that the petitioner has satisfied the regulatory requirements, no independent evidence has been submitted to establish that the foreign entity continues to regularly do business. 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). Furthermore, 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)). The claim that the petitioner and the foreign entity are still qualifying organizations absent any corroborating evidence of the foreign entity's business transactions is simply insufficient to overcome the director's denial in this matter.

Upon review of the record of proceeding, the petitioner has not established that it has the required qualifying relationship with the foreign entity. Specifically, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G)(2) requires a qualifying organization to demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States or abroad. The petitioner has not demonstrated on appeal that a qualifying relationship still exists with the foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO also notes that the petitioner has failed to sufficiently document its claimed parent-subsidiary relationship with the claimed foreign entity. 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.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, U.S. Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

In this matter, no documentation pertaining to the ownership of the U.S. petitioner was submitted. 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)). Based on the current record, there is insufficient evidence to demonstrate that the petitioner was a wholly-owned subsidiary of the foreign entity as of the filing date of this petition, and thus the petitioner did not have a qualifying relationship with the foreign entity as required by the regulations. 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).

The second issue in this matter is whether the beneficiary will be employed by the United States entity 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.

In the initial petition, counsel submitted no details with regard to the proposed job duties of the beneficiary. Consequently, the director requested a detailed overview of the beneficiary's duties in a request for evidence issued on March 16, 2004. The director advised the petitioner of the deficiencies in the petition, and requested that the petitioner submit a copy of the US entity's organizational chart listing all employee positions and duties, as well as copies of the petitioner's state and federal quarterly tax returns, in an effort to overcome the reasons for denial. In a response dated June 10, 2004, counsel for the petitioner provided the following brief statement:

The Beneficiary is presently the Senior Executive of the Petitioner Company. The Beneficiary's position as President is the Highest Executive Position for the Petitioner Company. The Beneficiary's employment with the Petitioner is Executive in the nature and sense that the Beneficiary is responsible for the day to day policy and goal[s] of the Petitioner Company. The Beneficiary shall be responsible to ensure the growth and the continued success of the Petitioner Company. In the position of President the Beneficiary is responsible for maintaining the continued success of the Petitioner Company. The Beneficiary is responsible for hiring all junior staff and is responsible for the policy planning and goal making of the Petitioner Company. In fulfilling these duties the Beneficiary is not responsible to answer to any person, the Beneficiary shall make all decisions independently and without any senior authority. Thus the Beneficiary [possesses] discretionary decision making ability.

The petitioner did not provide copies of its quarterly wage reports as requested, nor did it specifically discuss the position titles and duties of the petitioner's other employees or the organizational structure of the petitioner.

On June 18, 2004 the director denied the petition. The director found that the totality of the evidence in the record was insufficient to establish that the beneficiary would be primarily employed in a managerial or

executive capacity. In addition, the director concluded that the current corporate structure of the US entity was unclear as a result of the petitioner's failure to submit evidence, and thus it could not be determined that the beneficiary oversaw a staff of professionals or that sufficient staff existed to relieve the beneficiary from performing non-qualifying duties. In addition, the director concluded that the actual duties of the beneficiary could not be determined from the minimal evidence contained in the record.

On appeal, the AAO notes that counsel once again repeats her assertions that the petitioner has satisfied all regulatory requirements, and introduces no new or independent evidence to establish the executive capacity of the beneficiary.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

The only description of duties provided by the petitioner was in response to the request for evidence. This description did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. Instead, it merely provided a generic description of the nature of his duties, and at times merely paraphrased the regulatory definitions. The AAO, upon review of the record of proceeding, concurs with the director's finding that the beneficiary will not be employed in either a primarily managerial or executive capacity. First, the petitioner failed to specifically articulate the nature of the beneficiary's duties. While the petitioner did identify the overall role of the beneficiary in the workplace, it failed to specifically discuss what the beneficiary did during an actual workday. 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). The position description contained in the record did not articulate what a specific day in the role of the beneficiary would consist of. Instead, the descriptions merely provided a brief synopsis of the beneficiary's overall duties, such as "responsible for the day to day policy" and "responsible for maintaining the continued success" of the petitioner. It did not discuss or identify job-specific tasks or obligations the beneficiary would be required to perform.

The statement provided by counsel in response to the request for evidence failed to discuss the details of the beneficiary's actual duties, nor did they clarify how the beneficiary was acting in a primarily managerial or executive capacity, as counsel claimed, when no other employees were identified or mentioned. Counsel basically equates managerial and executive capacity with the beneficiary's title of chief executive, yet fails to provide solid examples of how this capacity is actually attained. As discussed earlier in this decision, 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. v. Sava*, at 1108; *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Furthermore, 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 Obaighena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Furthermore, it appears that the beneficiary is the sole employee of the petitioner. Though specifically requested by the director, the petitioner failed to submit copies of its quarterly tax returns listing its employees and the wages paid to these employees. Furthermore, the petitioner failed to provide a list of the other claimed employees of the petitioner along with their duties and job titles. Finally, according to the petitioner's U.S. Corporation Income Tax Return for 2003, there were no salaries or wages paid to employees, nor were any costs of labor identified. Absent evidence to the contrary, the AAO must therefore assume that the operation of the petitioner's advertising and marketing business is the beneficiary's sole responsibility. Although managerial and executive tasks are most certainly required in the establishment and operation of such a business, the actual day-to-day functions must also fall on the beneficiary. 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). Consequently, the AAO must conclude that the beneficiary's duties are not *primarily* managerial or executive, although it is likely that the beneficiary's duties include some higher level tasks.

The record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner was notified of the deficiencies in the record and was provided with an ample period of time in which to supplement the record. The petitioner, however, ignored many of the director's specific requests, and thus has failed to satisfy its burden of proof in these proceedings. 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). It appears in this matter that the beneficiary was granted a one year period of stay to open a new office in the United States. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this additional reason, the petition may not be approved.

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).

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.