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File: WAC 04 226 51054 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 employ the beneficiary 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 appears to be a sole proprietorship organized in the State of California that seeks to operate a restaurant business and employ the beneficiary as its managing partner. The petitioner claims that it is a branch of [REDACTED] located in Lima, Peru. The petitioner seeks to employ the beneficiary in the United States to open a new office.¹

The director denied the petition, concluding that the petitioner did not establish that the beneficiary had been employed abroad 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's decision was erroneous, and the fact that the director based his decision on the size of the foreign entity was discriminatory. Counsel contends that the director's decision did not consider the beneficiary's position as a majority shareholder in the foreign entity, and asserts that since he answered to no higher person in the organization, he clearly satisfied the regulatory requirements.

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.

¹ The AAO notes that on Form I-129, the petitioner indicated that it was *not* a new office. However, absent evidence that the petitioner had been doing business for the year prior to the petition's filing, the director determined that the petitioner met the definition of a "new office" as defined by 8 C.F.R. § 214.2(l)(1)(ii)(F) and proceeded to adjudicate the petition on this basis.

- (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.
- (v) If the petition indicates that 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 (1)(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.

The primary issue in this matter is whether the beneficiary was employed abroad in a primarily managerial or executive capacity.

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

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

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

With the initial petition, the petitioner submitted a letter dated August 12, 2004 which outlined the beneficiary's duties abroad. Specifically, the petitioner stated that the beneficiary joined the foreign entity as managing partner since December of 1991 without interruptions. With regard to his specific duties, the petitioner stated: "[The beneficiary] has been in charge of the entire company as a Managing Director [since 1991]. From its inception, [the beneficiary] has provided a strong and knowledgeable hand in guiding the company."

The director issued a request for additional evidence on August 19, 2004. The request specifically asked the petitioner to submit documentation outlining the beneficiary's duties abroad, the number of employees on the petitioner's payroll, an organizational chart outlining the organizational hierarchy of the foreign entity, and the reason for the beneficiary's transfer to the United States. The director also asked for payroll records as evidence of the beneficiary's employment with the foreign entity. In a response dated November 11, 2004, the petitioner submitted the requested evidence, including an organizational chart showing thirteen employees and the beneficiary's position at the top of the petitioner's organizational hierarchy. With regard to the director's request for a more detailed description of the beneficiary's duties, counsel for the petitioner provided the following statement:

As a managing director, the beneficiary was in charge of the executive management [of] the entire company. He hired and fired supervisory and other management personnel. Set up and implemented company policy. Call[ed] for shareholder/family meetings when needed.

Supervised upper management personnel. Made all important decisions for the company on a regular basis, including expansion, marketing and investment decisions.

With regard to the director's request for payroll records, the petitioner responded by stating that the beneficiary was not paid wages or a salary by the petitioner. Instead, the petitioner explained that the beneficiary was compensated as a managing director by way of his 50% ownership interest, and not as an employee.

On November 18, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary had been functioning abroad in a primarily managerial or executive capacity. Specifically, the director concluded that the petitioner had failed to establish by the evidence submitted that the beneficiary had supervised a subordinate staff of professionals, that he functioned at a senior level within the organization, or that he managed an essential function of the foreign entity.

On appeal, counsel for the petitioner restates the beneficiary's qualifications and asserts that the director's decision failed to consider the beneficiary's role in the foreign organization because of his focus on the size of the entity. Counsel reasserts the beneficiary's qualifications and concludes that the petitioner has established that the beneficiary functioned in a managerial capacity while abroad.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee turns on whether the petitioner has sustained its burden of proving that her duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a qualified manager or executive by virtue of his position title, experience abroad, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed 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).

The description of the beneficiary's proposed duties, provided in the initial letter of support and again in response to the request for evidence, is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "hired and fired supervisory and other management personnel," "set up and implemented company policy" and "made all important decisions for the company on a regular basis" does little to tell what the beneficiary's daily duties entail. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.*

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties abroad were primarily managerial or executive in nature. Additionally, the petitioner has 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 since, according to the petitioner, the beneficiary is not actually employed by the foreign entity. For this reason, the petition may not be approved.

Beyond the decision of the director, record contains insufficient evidence to establish that a qualifying relationship exists between itself and the foreign entity. Specifically, there is insufficient documentation to establish the actual ownership and entity type of the petitioning entity. 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.

In this matter, there is conflicting evidence with regard to the petitioner. On the I-129 petition, the petitioner states that it is a partnership and a branch of the foreign entity. The Fictitious Name Statement submitted with the petition, however, clearly indicates that the petitioner is a sole proprietorship and not a partnership. Moreover, in the response to the request for evidence, the petitioner indicates that the U.S. entity is a sole proprietorship. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, insufficient evidence exists in the record to establish the actual ownership structure of the petitioner. The petitioner claims that the U.S. entity is owned in equal shares by the beneficiary and Sara Tawata, but later claims that it is a sole proprietorship. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must generally 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. In this case, however, the petitioner claims that such documents are not available as they do not pertain to the entity types of the petitioner and the foreign entity. The petitioner submits evidence of wire transfers made by the beneficiary, but the exact use of the funds is undocumented in the record. Merely asserting that the two entities share common ownership without submitting corroborating evidence is not sufficient to satisfy the requirements of a qualifying relationship. 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)). For this additional reason, the petition may not be approved.

Based on the evidence submitted, however, it appears the petitioner is a sole proprietorship instead of a partnership. As such, the beneficiary is ineligible for the classification sought as a matter of law. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. *See* 8 C.F.R. 214.2(l)(1)(ii)(G)(2). The petition includes evidence that demonstrates that the beneficiary is doing business as a sole proprietorship. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a

sole proprietorship does not exist as an entity apart from the individual proprietor. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). As in the present matter, if the petitioner is actually the individual beneficiary doing business as a sole proprietorship, with no authorized branch office of the foreign employer or separate legal entity in the United States, there is no U.S. entity to employ the beneficiary and therefore no qualifying organization.

A related issue is the beneficiary's ownership interest in both entities and thus, whether the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); *see also* 8 C.F.R. § 214.2(l)(3)(vii). The record suggests that the beneficiary is the majority owner of the petitioning organization and the foreign entity abroad. Therefore, the beneficiary's stay in the U.S. does not appear to be temporary. 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.