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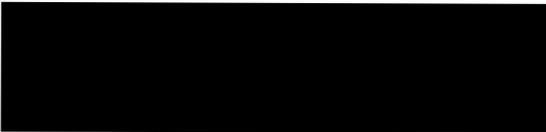
File: LIN 04 037 55048 Office: NEBRASKA SERVICE CENTER Date: **OCT 04 2006**

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, Nebraska 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 general manager 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 Chinese corporation, seeks to continue to employ the beneficiary in the United States at its branch office, a corporation organized in the State of Minnesota that is engaged in the purchase, assembly and manufacture of airplanes and helicopters.¹ The beneficiary was initially granted a one-year period of stay, and the petitioner now seeks to extend the beneficiary's stay for two more years.

The director denied the petition, concluding that the petitioner did not establish that (1) the petitioner was doing business as required by the regulations; and (2) the beneficiary will 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 contends that the director erred by finding that the beneficiary would not be employed in a primarily managerial or executive capacity and that the petitioner was not doing business, and contends that the petitioner in fact submitted sufficient evidence to establish eligibility. In support of this contention, counsel submits a detailed brief.

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

¹ The petition is filed on behalf of [REDACTED] the Chinese parent company. On the L Supplement to the Form I-129, the petitioner indicates that it seeks to extend the employment of the beneficiary at its branch office in Minnesota, named [REDACTED]. However, letterhead used for a letter of support from the petitioner dated November 11, 2003, indicates that the name of the foreign entity [REDACTED] and this letter indicates that all companies in question are owned by [REDACTED]. Furthermore, corporate documentation included in the record indicates that the name of the Chinese parent is instead [REDACTED]. Additionally, the record indicates that the initial L-1A petition in this matter, filed under Receipt Number LIN-02-237-54058, was approved for [REDACTED] again an entirely different petitioner in name from the petitioner named in the instant petition. The petitioner has provided no clarification with regard to the nature and the relationship of the named corporate entities, i.e., whether it is a branch office, affiliate, or subsidiary of the foreign employer, thus creating a record which is confusing and contradictory. 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). It should also be noted that, according to the Minnesota Secretary of State, the intended U.S employer, namely [REDACTED] is currently inactive. Therefore, it raises the issue of the company's continued existence as a legal entity in the United States. This matter will be discussed in further detail in the body of the decision.

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 this matter is whether the petitioner has been doing business as required by the regulations for the previous year. 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.”

In this matter, the petitioner claims that it is engaged in the purchase, assembly and manufacture of airplanes and helicopters. The director denied the petition, finding that the petitioner had failed to satisfy the regulatory requirements for doing business.

With the initial petition, the director found the evidence submitted in support of the petitioner’s business practices was insufficient. As a result, a request for evidence was issued on February 4, 2003, requesting additional documentation showing the petitioner’s continuous provision of goods and services as required by the regulations. In its response, the same documentation submitted with the initial petition was resubmitted by the petitioner. These documents, submitted by the petitioner as evidence of its business dealings for the previous year, consist of correspondence between the petitioner and other companies within the aviation industry. Many of these documents evidence correspondence regarding potential dealership arrangements, product inquiries, and confidentiality agreements. Some of these documents, in fact, evidence direct dealings of the foreign parent company with third parties in the United States. It is unclear what role the U.S. entity is actually playing and, thereby, what role the beneficiary will play, in these transactions. For example, invoices from Rotorway dated April 7, 2003 list the consignee and “bill to” contact as the foreign parent company, not the U.S. petitioner.

On review of the evidence submitted, the AAO concurs with the director’s finding that the petitioner failed to demonstrate that a qualifying organization within the United States had been doing business during the previous year. The record indicates that the beneficiary was granted a one-year period of stay from January 2, 2003 to January 1, 2004 to open a new office. The record further indicates that the petitioner would engage in the *purchase, manufacture, and assembly* of airplanes and helicopters. Other than inquiries with regard to certain products, there is no documentation in the record to demonstrate the petitioner has actively begun engaging in the stated goals above.

Based on this limited information, it is clear that the petitioner was not doing business as required by 8 C.F.R. § 214.2(l)(14)(ii)(B). The AAO acknowledges counsel’s contention on appeal that the documentation submitted, both in response to the request for evidence and with the initial petition, satisfies the service’s request. However, the director specifically requested evidence that the petitioner had conducted a regular, systematic and continuous provision of goods and services during the previous year in the February 4, 2004 letter. In lieu of addressing this request, the petitioner merely re-submitted the previously submitted documentation which had already been deemed insufficient by the director. 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).

A second issue relating to this question is whether a United States branch office actually ever existed. The petitioner, a Chinese entity, claims that the beneficiary is employed by its branch office in the United States. However, this alleged branch office, which evidence shows instead to be a separate legal entity, *infra*, is inactive, according to the records of the Minnesota Secretary of State, thereby raising the question of whether a U.S. employer actually exists. Furthermore, the evidence submitted in support of the premise that the U.S. entity is doing business and is thus a qualifying organization consists primarily of invoices documenting

transactions between the *Chinese* entity and third parties, not the U.S. entity named in the petition. In addition to diminishing the petitioner's claim that a U.S. employer exists and is doing business, these invoices suggest that the beneficiary is actually employed by the foreign entity, and not an independent branch or subsidiary operating in the United States.

If this is the case, the precedent decision *Matter of Penner* is directly applicable to the facts. 18 I&N Dec. 49, 54 (Comm. 1982). In *Matter of Penner*, the Associate Commissioner upheld the director's denial of the L-1 petition in part, because the beneficiary was directly employed by the foreign employer and not by a U.S. employer. The Associate Commissioner determined that, in order to qualify the beneficiary as an intracompany transferee, the foreign entity may not directly employ the beneficiary, without having him or her be controlled in some way by (and thus, in fact, have some employment relationship to) the foreign entity's office in the United States. *Id.* To permit otherwise would be contrary to the intent of Congress since "virtually any foreign based business would be able to use the 'L' visa category to bring to the United States any number of its employees, whether or not a business entity existed or was being established in this country." *Id.* Here, the invoices submitted in support of the claim that a U.S. employer exists and is doing business in fact demonstrate that these transactions are being performed by the foreign parent, not the U.S. entity. Coupled with the fact that the claimed U.S. employer is no longer an active corporation in the United States, it appears that the foreign petitioner will directly employ the beneficiary in the United States. As such, the petitioner is ineligible for the benefit sought.

The fact that the petitioner did not commence regular and systematic business operations prohibits the extension of this petition. Furthermore, the petitioner does not acknowledge the discrepancy in the record with regard to its business activities. Although it claimed that the U.S. "branch" was a manufacturer and assembler of airplanes and helicopters, it has provided no evidence that a U.S. entity has undertaken such tasks, or that it has sufficient staff skilled in these areas to actually undertake such a business. 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).

The regulation at 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of a new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) require the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted at the time of filing confirmed that a qualifying organization in the United States had not been conducting business as required. The fact that the Chinese parent began consistently corresponding with third parties within the aviation industry does not automatically entitle the petitioner to an extension of the visa, for it fails to change the fact that the petitioner failed to conduct business during the previous year. For this reason, the petition may not be approved.

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 letter of support dated November 11, 2003, the petitioner provided a list of the beneficiary's duties while in the United States. Specifically, the duties were identified as follows:

1. She made decision to purchase all the parts and components of two EXEC 162F helicopters produced by [REDACTED] of the US . . .
2. She is in charge of negotiation with American companies . . . and she has been paving the way for the successful operation.
3. She has set up a new company in a most effective way, she has brought together a professional team to work on each project through high tech communication in and out of the United States. The team includes operational manager, accountants, public relations personals [sic], and technical service personals [sic]. [The beneficiary] has set standards for the work and general guidelines for each project, which must be followed and

executed by the team, and coordinates the various projects to assure that each project is serviced adequately and on schedule.

A further breakdown of the percentage of time devoted to each duty was put forth as follows:

Management	50% (Including setting up a new establishment and bringing together a team of helicopter kits)
Supervising	20% (Identified supervision of a business manager, technology support personnel, office administrator, and/or public relations professionals)
Human Resource	10% (Including evaluate personnel performance)
Discretion Duties	20% (Including supervising personnel and setting standards for work and projects)

The director found this initial description of the beneficiary's duties insufficient and consequently issued a request for evidence on February 4, 2004. The request required the petitioner to submit a statement regarding the staffing of the U.S. operation, with a description of the positions held by other employees.

In response, the petitioner submitted a statement which indicated that the U.S. entity had three full time employees and two contracted experts. Namely, they were identified as the beneficiary, an operational manager, an office assistant and interpreter, and two outside contractors for accounting and legal services. Although payroll records verified the employment of these two other employees, no additional information regarding their duties or their role in the organization was provided.

On July 3, 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 duties described in the record were too vague and insufficient to clearly show that the beneficiary was employed in managerial or executive capacity. On appeal, counsel for the petitioner restates the beneficiary's qualifications and asserts that beneficiary is in fact a manager. No specific assignment or error with regard to the director's finding has been addressed.

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 sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is a manager and/or executive by virtue of her position title, experience, 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).

At the time of filing, the petitioner was an almost two-year old manufacturer and assembler of airplanes and helicopters. Yet, it employed only the beneficiary, an operational manager, and an office assistant and interpreter. The beneficiary's stated duties include the purchase of two helicopters and an abundance of first-hand communication with vendors and clients within the aviation industry. The overall description of the beneficiary's duties, provided in the initial letter of support, is vague and seems to merely paraphrase the regulatory definitions. When specifics are provided, it appears that the beneficiary is engaged in many transaction and marketing tasks associated with developing the business. The overall description, however, did little to clarify what the beneficiary does on an average workday. The evidence provided suggests that the beneficiary is single-handedly running and not managing the operations of the petitioner.

The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of her time is devoted to the company's marketing and acquisitions. Furthermore, it appears that based on the petitioner's statements, the petitioner is still in a start-up phase. Since the beneficiary apparently oversees only two administrative staff members whose actual duties are unspecified, there does not appear to be sufficient staff to handle the marketing functions and correspondence that are the beneficiary's responsibilities. Consequently, it appears that all of these functions fall on the shoulders of 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).

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary and two administrative staff members. The petitioner indicates that the business is still developing, and once fully operational, it will hire additional employees. It is evident, therefore, that without the required staff, the beneficiary is required to perform the duties that would normally be delegated to subordinate employees in order to keep the business operational. Although the petitioner asserts that the beneficiary is truly acting in a managerial or executive capacity, the petitioner provides no independent evidence to corroborate these claims. The petitioner does not meet its burden of proof in these proceedings without documentary evidence to support its statements, *Matter of Soffici*, 22 I&N Dec. at 165. Furthermore, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel on appeal do not constitute evidence. *Matter of Obaighena*, 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).

Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" 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 does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. The petitioner must establish eligibility at the time of filing. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg.

Comm. 1978). 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 the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, and as alluded to above, it remains unclear whether a qualifying relationship exists between the Chinese petitioner and a U.S. organization. The regulation at 8 C.F.R. § 214.2(l)(3)(i) requires evidence demonstrating that the petitioner and the organization which employed or will employ the alien are qualifying organizations. The term "qualifying organizations," as defined by the regulations, requires evidence that the organizations meet exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in 8 C.F.R. § 214.2(l)(1)(ii). Additionally, the regulation requires that both entities be doing business; which, as previously discussed, the petitioner has not established.

The exact nature of the relationship between the Chinese parent and the Minnesota corporation is not sufficiently established in the record. For example, the petition indicates that the U.S. entity is a branch of the Chinese 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(l)(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(l)(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. at 54 (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," since 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. In this matter, the petitioner submitted evidence of the U.S. entity's incorporation in the State of Minnesota. Therefore, pursuant to the provision above, that corporation is a distinct legal entity separate and apart from the foreign organization and does not qualify as a branch office.

More importantly, however, is the fact that the U.S. entity elected S-Corporation status. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation *may not have any foreign corporate shareholders*. See Internal Revenue Code, § 1361(b)(1999)(emphasis added). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. However, it is apparent that there is no parent-subsidiary relationship between these entities, and therefore a qualifying relationship cannot be found to exist based on the evidence in the record. 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 at 1043.

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.