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AUG 28 2007
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FILE: SRC 05 241 51166 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Chief
Administrative Appeals Office
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DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify 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 is a corporation organized in the State of Florida and claims to be engaged in the food retail, bakery and restaurant business. The petitioner claims that it is a wholly owned subsidiary of Apsys Investment S.A.R.L. (Apsys), a Luxembourg limited liability company, which also has ownership interest in a California limited liability company called French House Select Kosher Products, LLC (French House) where the beneficiary is presently employed. The petitioner further claims that the beneficiary was employed overseas by [REDACTED] a French corporation located in Neuilly Sur Marne, France, which the petitioner claims is the majority owner of French House.

The director denied the petition, concluding that the record does not show that the beneficiary has the required employment with a qualifying foreign entity for at least one year out of the three years prior to his transfer to the United States.

On appeal, counsel asserts that there exists a qualifying relationship between the petitioner and a qualifying foreign entity in that (1) ELDAI, the beneficiary's foreign employer prior to his transfer to the United States, and French House, his current employer, were owned and controlled by the same group of shareholders during at least one year of the beneficiary's employment overseas, and (2) French House has merged into the U.S. petitioner. Counsel submits additional documentation in support of these assertions on appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, the beneficiary must have been employed abroad by a qualifying organization, in a qualifying managerial, executive, or specialized knowledge capacity, for one continuous year. 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.

At issue in this proceeding is whether a qualifying relationship exists between the petitioner and the beneficiary's foreign employer, and whether the beneficiary was employed abroad by a qualifying organization for one continuous year during the three years preceding the filing of the petition.

The pertinent regulations at 8 C.F.R. § 214.2(1)(1)(ii) define the term "qualifying organization" and related terms as follows:

(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 (1)(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.

* * *

(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.

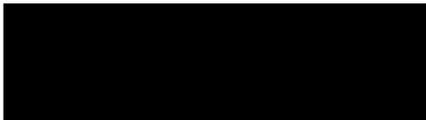
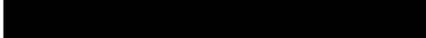
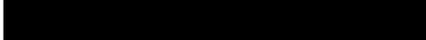
(L) *Affiliate* means

- (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.

In a letter dated August 31, 2005, accompanying the initial petition, the petitioner stated that between 1995 and 1999, the beneficiary served as national sales manager for ELDAI in France. The petitioner indicated that in June 2001, the beneficiary entered the United States, in E-2 status, to serve as President and CEO of French House.¹ In the same letter, the petitioner stated that ELDAI owned 51% of French House, and the remaining 49% of French House is held by Apsys, which owns 100% of the petitioner. There appears to be no direct relationship between ELDAI and Apsys.

The petitioner submitted with the initial petition a copy of its share certificate number 1 dated March 15, 2004, showing that Apsys holds 1,000 common shares, comprising all of the authorized shares of the petitioner. The petitioner also submitted copies of membership certificates for French House, all dated October 18, 2000, setting forth the membership interests in that company as follows:

	37%
	24%
FINAP	25%
	1%
	1%
	12%

In addition, the petitioner submitted a copy of a document entitled "Memorandum of Merger" between French House and the petitioner, dated August 30, 2005 and signed by the beneficiary as president and CEO of both entities. The document states that "[French House] shall be merged into Apety Group, Inc. such that Apety Group, Inc. shall acquire the shares and control over the operations of [French House] and that said merger shall become effective on the date that the [beneficiary] obtains an L-1A visa with Apety Group, Inc." The petitioner also provided a chart outlining the corporate relationships among Apsys, French House, ELDAI, and the petitioner. There was no documentation in the initial submission regarding the ownership or control of ELDAI.

In a request for evidence (RFE) dated September 9, 2005, the director requested, among other things, evidence that French House is owned and controlled by the petitioner and evidence of ownership and control of ELDAI, S.A.

In response to the RFE, the petitioner resubmitted its August 31, 2005 letter, the memorandum of merger, and the corporate relationship chart. The petitioner also included a copy of the minutes of ELDAI's board meeting on December 11, 2002, in which the ELDAI board adopted the following transfers of shares as of that date:

¹ The petitioner submitted a copy of the beneficiary's resume describing his employment with these two companies during the periods "1995-1999" and "2001 to the present." However, there is no information in the record regarding the beneficiary's employment from 1999 through June 2001.

Transferor	Transferee	No. of shares	%
		1	.001
		1	.001
		3,796	50.00
		2	.0026
		1,518	20.00
		2	.0026
		2,280	30.00

In a decision dated September 14, 2005, the director denied the petition. The director noted that the record does not show that the same individuals who own ELDAI also own 51% of French House. Therefore, no qualifying relationship exists between those two entities. Moreover, the director observed, the evidence shows that at the time of filing the petition, the merger between French House and the petitioner has not yet occurred. Based on these findings, the director concluded that the petitioner has not shown that the beneficiary has the required employment with a qualifying foreign entity for at least one year out of the three years prior to his transfer to the United States in E-2 classification.

On appeal, counsel submits two new documents: (1) the minutes of the board meeting of ELDAI on December 30, 1998, which lists the owners of the company and their respective holdings at that time, and (2) a copy of an amended memorandum of merger between the petitioner and French House, this time stating that the merger is effective as of August 30, 2005. The amended memorandum of merger is undated and signed by the beneficiary as president and CEO of both entities. Counsel asserts that the new documents show that ELDAI and French House have a qualifying relationship during at least one year of the beneficiary's foreign employment, and a qualifying relationship exists between French House and the petitioner as French House has merged into the petitioner.

At the outset, the AAO notes that insofar as the evidence submitted on appeal pertains to the ownership and control of ALDAI and the relationship between French House and the petitioner, it is evidence specifically requested by the director in the RFE, which the petitioner failed to provide prior to adjudication of the petition. The 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). Moreover, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the RFE. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Therefore, the appeal will be adjudicated based on the record of proceeding before the director.

Upon review, the AAO finds that the record does not demonstrate that there exists a qualifying relationship between the petitioner and the beneficiary's foreign employer, or that the beneficiary has the required employment with a qualifying foreign entity for at least one year out of the three years prior to the filing of this petition.

The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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.

Counsel claims on appeal that a qualifying relationship exists between the beneficiary's foreign and U.S. employers because ELDAI shares common ownership with French House when the beneficiary was employed by ELDAI, and French House in turn has merged into the petitioner. The record does not support counsel's claims. It must be emphasized that the petitioner must establish eligibility *at the time of filing the nonimmigrant visa petition*. 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). Accordingly, the petitioner is required to show that a qualifying relationship exists between the foreign and U.S. entities at the time the petition was filed.

First, the record does not show that there is, or has been at any point in time, a qualifying relationship between ELDAI and the petitioner. The petitioner is 100% owned by Apsys. ELDAI's shares are held by a number of individuals unrelated to Apsys. There is no evidence in the record that would suggest that the two entities have any common ownership or control such that they could be considered "affiliates," nor is there evidence of any other qualifying relationship as defined under 8 C.F.R. § 214.2(I)(1)(ii) between the two entities.

Second, contrary to counsel's claims, the record is insufficient to establish that there is a qualifying relationship between ELDAI and French House, either at the time of the beneficiary's employment with ELDAI, or at the time the petition was filed. Even if the AAO were to consider the document submitted on appeal which purportedly sets forth the ownership of ELDAI in December 1998, there is no documentation evidencing French House's ownership during the same period.² Moreover, the only evidence of record documenting the ownership of the two entities, including French House's membership certificates dated October 18, 2000 and ELDAI's December 11, 2002 board minutes, do not show that there is common ownership or control that would qualify the two entities as "affiliates," nor does the evidence support the petitioner's claim that ELDAI owns 51% of French House. Thus, the record is insufficient to demonstrate that a qualifying relationship exists between ELDAI and French House at the time the petition was filed.

Furthermore, even if the record had shown a qualifying relationship between ELDAI and French House, that would not in turn establish a qualifying relationship between the foreign employer and the petitioner, since the record does not establish that at the time of the filing of this petition, the merger between French House and the petitioner had occurred. Prior to the issuance of the director's decision, the petitioner twice submitted a memorandum of merger stating that the merger would take effect upon the beneficiary acquiring L-1A status through his employment with the petitioner. However, on appeal, counsel submits an amended

² As previously noted, the Membership Certificates and LLC Operating Agreement for French House submitted with the initial petition are dated October 18, 2000.

memorandum of merger, changing the effective date of the merger to August 30, 2005. As stated earlier, the AAO does not accept documents submitted on appeal that were previously requested by the director and could have been made available prior to the director's decision. Moreover, even if the AAO were to take into consideration the amended memorandum of merger, it is noted that neither the petitioner nor counsel has offered any explanation or clarification of the change in the effective date of the merger. 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). Without any explanation accounting for the change in the effective date of the merger, the AAO must question whether the amendment was made solely in an attempt to cure the beneficiary's ineligibility for the benefit sought. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* Furthermore, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Under these circumstances, the AAO finds that the evidence of record is insufficient to establish that French House had merged into the petitioner at the time the petition was filed.

Finally, the evidence does not establish that any other qualifying relationship exists between French House and the petitioner. The petitioner claimed that Apsys, the petitioner's parent company, holds 49% interest in French House through the beneficiary and an entity called Finap, which the petitioner claimed to be another subsidiary of Apsys. However, the petitioner has submitted no documentation to support its claim that Apsys controls the beneficiary's and Finap's membership interests in French House. Moreover, even if the petitioner did submit such documentation, control or ownership of 49% of French House by the petitioner's parent company is insufficient to establish that French House and the petitioner are "affiliates" as that term is defined in the regulations.

Accordingly, the AAO finds that the petitioner has failed to show that the petitioner and the foreign entity that employed the beneficiary are "qualifying organizations" as required by the regulation at 8 C.F.R. § 214.2(l)(3)(i).

The AAO notes that in her decision, the director concluded that "the beneficiary does not have the required employment with a qualifying foreign entity for at least one year out of the three years prior to his transfer to the United States in E-2 classification." If a qualifying relationship had been established between ELDAI and French House, the beneficiary's employment at French House between June 2001 and the filing of the present petition would be a "[period] spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof," which, according to the regulation, "shall not be interruptive of the one year of continuous employment abroad but . . . shall not be counted toward fulfillment of that requirement," and, accordingly, the required "one-out-of-three-year" period of overseas employment for the beneficiary would have to fall within the three years preceding June 2001. 8 C.F.R. § 214.2(l)(1)(ii)(A). However, since the evidence does not show that a qualifying relationship exists between ELDAI and French House, the period of employment with French House does not fall under the exception set forth in 8 C.F.R. § 214.2(l)(1)(ii)(A). Therefore, the petitioner must establish that the beneficiary was employed by a qualifying foreign entity for at least one year out of the three years prior to the filing of this petition, rather than prior to his transfer to the United States in E-2 classification to work for French House. To the extent the

director applied the requirement to the incorrect time period, that aspect of the director's decision will be withdrawn.

Notwithstanding the foregoing, however, the AAO finds that the petitioner has 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, as required by the regulation at 8 C.F.R. § 214.2(l)(3)(iii). The present petition was filed on September 2, 2005. According to the records, the beneficiary was employed in the United States by French House from June 2001 until that time. Since French House is a corporation organized in the State of Florida that, as discussed earlier, does not have a qualifying relationship with the petitioner, the beneficiary cannot be said to have been employed "abroad" or "with a qualifying organization" during those years. Consequently, the requirement set forth under 8 C.F.R. § 214.2(l)(3)(iii) has not been met.³

In light of the foregoing, the AAO concludes that the evidence of record does not establish that there exists a qualifying relationship between the beneficiary's foreign employer and the U.S. petitioner, or that the beneficiary was employed abroad by a qualifying organization for one continuous year during the three years preceding the filing of the petition.

Beyond the decision of the director, the AAO finds that the evidence is insufficient to establish that the beneficiary would be employed by the petitioner in a managerial or executive capacity. 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(l)(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.*

In its August 31, 2005 letter, the petitioner described the beneficiary's job duties in the United States as follows:

[The beneficiary will] take on full responsibility over [the petitioner]. This will include directing and coordinating the activities of [the petitioner] including the overseeing [sic] the development and expansion of PAUL USA stores in the U.S. [The beneficiary] will formulate and administer company policies and administrative policies as well as develop long range goals and objectives for [the petitioner]. [The beneficiary] will review analysis of activities, costs and operations and forecast data to determine the progress of the company

³ The AAO notes that, even if a qualifying relationship had been established between ELDAI and French House, and the relevant time period were the three years preceding the beneficiary's employment with French House in June 2001, the petitioner still would have failed to show that the beneficiary has the required "one-out-of-three-year" period of overseas employment. While the record indicates that the beneficiary was employed by ELDAI from 1995 to 1999, it does not specify when in 1999 the beneficiary ceased to work for that entity. Therefore, it is not clear based on the record whether the beneficiary indeed worked for ELDAI for "at least one year" out of the three years preceding his admission to the United States to work for French House in E-2 status.

towards stated goals and objectives. [The beneficiary] will confer with executive management and directors of [the petitioner] to review achievements and discuss required changes and goals or objectives. [The beneficiary] will also assist [the petitioner] in searching for and hiring qualified executive and managerial employees.

Without further details, the above description of the beneficiary's anticipated job duties is vague and nonspecific and fails to demonstrate what the beneficiary would do on a day-to-day basis. 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. 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). Moreover, while the record does include a business plan with a proposed organizational chart for the petitioner, there is no evidence that a staff is actually in place to relieve the beneficiary from performing non-qualifying duties relating to the day-to-day operations of the company. In light of these deficiencies in the record, the AAO finds that the petitioner has not sufficiently demonstrated that it would employ the beneficiary in the United States in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.