

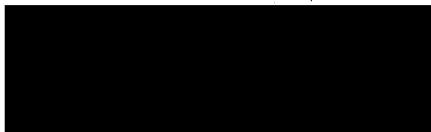
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U.S. Department of Homeland Security
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U.S. Citizenship
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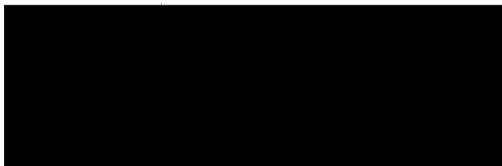
File: WAC 05 168 54155 Office: CALIFORNIA SERVICE CENTER Date:

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 seeks to employ the beneficiary temporarily in the United States 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 U.S. petitioner, a corporation organized in the State of California that is engaged in the export of building materials, seeks to employ the beneficiary as its vice president and operations director. The petitioner claims that it is the subsidiary of [REDACTED]

The director denied the petition concluding that the petitioner did not establish that (1) sufficient physical premises had been secured to house the new office; (2) the beneficiary had been employed abroad in a primarily managerial or executive capacity; or (3) a qualifying relationship existed between the petitioner and the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director ignored much of the evidence submitted in support of the petition, and argues that contrary to the director's findings, the petitioner is in fact qualified for the benefit sought. In support of this assertion, 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 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.
- (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 (I)(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 first issue in this matter is whether the petitioner secured sufficient physical premises to house the new office. The petitioner indicates that the beneficiary will be coming to the United States to open a new office. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) provides that if 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 sufficient physical premises to house the new office have been secured.

The petitioner submitted no documentation regarding the location of its business with the initial petition. Consequently, in a request for evidence dated June 29, 2005, evidence demonstrating that the petitioner had complied with this requirement was requested. Specifically, the director asked for photographs of the business premises, both inside and out, as well as a copy of the lease agreement which detailed the square footage of the property in addition to a copy of its insurance policy and occupancy permit.

In a letter dated September 20, 2005, counsel responded to the petitioner's request. The petitioner indicated that it had secured a business location in Walnut Creek, California. The petitioner included photographs of the exterior of the business as well as copies of bills that represented "rental expenses" for the new office. Counsel stated that since the lease agreement was on a month-to-month basis, no written agreement could be furnished.

On November 14, 2005, the director denied the petition. Specifically, the director found that the evidence submitted did not establish that sufficient physical premises had been secured by the petitioner as required by the regulations. The director noted that the absence of a written lease agreement and interior photos of the alleged business location raised questions regarding the validity of the petitioner's claims. The director further noted that the petitioner's submission of phone bills and other such documents was simply insufficient to meet the regulatory requirements. On appeal, counsel alleges that ample evidence was submitted in response to the request for evidence to establish that sufficient premises had been secured. No new evidence is submitted to support this claim.

Upon review, the AAO concurs with the director's findings. The regulations clearly state that sufficient physical premises to house the new office must be secured. In this matter, however, the petitioner failed to submit a lease agreement or photos of its interior business location. Instead, it relies on photographs of the exterior of a structure and its claim that it leases that structure on a month-to-month basis as proof it has satisfied this requirement. The AAO is not persuaded.

The photographs of the alleged business location merely show the address of the building at which it claims to house its business. No signage indicating that the petitioner's business operates out of this location has been submitted. More importantly, a photo of the tenant directory from the building's lobby indicates that a number of businesses operate out of Suite 300, the suite the petitioner allegedly leases. The petitioner, however, is not listed, as far as the AAO can see from the picture submitted, on this directory.¹ Finally, the only other evidence submitted in support of the claim that the petitioner operates from this Walnut Creek location is an invoice for an answered line, a mailbox, and a lobby listing. Since this invoice is dated August 16, 2005 and appears to be for start-up services, it must be concluded that this premises was not secured by the petitioner at the time of the petition's filing in May 2005. 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).

More importantly, however, is the conflicting information contained in the record regarding the petitioner's actual business location. In the initial petition and on the letterhead from which the petitioner's supporting letters are written, an entirely different address is listed. The AAO notes that on the Form I-129, this address is also listed as the beneficiary's address in the United States. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such

¹ Although another paragraph shows the petitioner in Suite 300, it is unclear whether this is from the same directory for this building. Moreover, this photograph also shows the petitioner as sharing the same suite and/or as operating jointly with a company named Eastbay Service Company, Inc.

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).

As there is insufficient evidence that the petitioner has secured sufficient physical premises, the petition may not be approved.

The second 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.

In the Form I-129, the petitioner only provided a general overview of the beneficiary's duties abroad and counsel merely claimed in his letter dated May 24, 2005 that the beneficiary worked in a managerial position abroad. Specifically, the petitioner stated that his duties included:

Communicating with people within the construction business in the United States and Taoyuan region in Taiwan; determining and formulating policies and providing the overall direction of the company; taking care of managing daily operations; developing and executing a long-range [plan] and identifying business opportunities in the US and Taiwan market; establishing relationship with foreign investor[s], and maintaining those bonds; general administration affairs of the company, and general management of company's matters in American branch[] concerning business activities, and operational activities at the highest level of management.

The director found this initial overview too vague, and therefore additional evidence was requested on June 29, 2005. Specifically, the director requested more information regarding the beneficiary's day-to-day duties and those of his subordinates. In response, the petitioner provided the following updated description in a letter dated September 20, 2005:

The beneficiary, working abroad for [the foreign entity] was responsible for communicating with people within the construction business in the United States and Taoyuan region in Taiwan; determining and formulating policies and providing the overall direction of the company; taking care of managing daily operations; developing and executing a long-range planning [sic] and identifying business opportunities in the US and Taiwan market, establishing relationship with foreign investor, and maintaining those bonds; general administration affairs of the company, and general management of company's matters in the American branch; concerning business activities.

No additional documentation was submitted.

The director found this response insufficient to warrant a finding that the beneficiary had been employed in a primarily managerial or executive capacity abroad, and subsequently denied the petition. On appeal, counsel for the petitioner argues that ample evidence was submitted to support a finding in favor of the petitioner, and asserts that the director ignored a decision dealing with situations where the sole employee of a company could still be deemed an executive.

The AAO concurs with the director after reviewing the record. Upon review of the beneficiary's stated duties abroad, the description of duties is too vague to ascertain whether the beneficiary will be acting in a primarily 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). In this case, the petitioner vaguely described each of the beneficiary's duties, and essentially summarized the definition of executive capacity.

The description of his duties is vague and not specific enough to clearly establish the beneficiary's role in the foreign company. 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 will the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd.*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Additionally, counsel continually asserts that it had submitted enough evidence to establish the beneficiary's qualifications and therefore the petition should be granted on that basis. As previously stated, 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The petitioner has failed to submit sufficient evidence establishing that the beneficiary was employed abroad in a primarily managerial or executive capacity. For this additional reason, the petition may not be approved.

The final issue in this matter is whether the petitioner and the foreign entity 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.

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 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*, 19 I&N Dec. at 595.

In this matter, the director found that the evidence submitted in support of the claimed relationship between the foreign entity and the petitioner was insufficient to warrant approval. Specifically, after requesting additional evidence regarding the claimed relationship between the two entities on June 29, 2005, the director noted that despite submitting a copy of the stock certificate and stock ledger evidencing the foreign entity's alleged ownership of all outstanding shares of the U.S. entity, the director noted that no evidence had been submitted to establish that the foreign entity had actually paid for these shares. Consequently, the director denied the petition. On appeal, counsel asserts that the relationship was well documented by the share certificate and the petitioner's letter discussing the foreign entity's financial investment in the U.S. entity.

Upon review, the AAO concurs with the director's findings, and notes an additional basis for finding that a qualifying relationship did not exist between the parties. The AAO will first examine the director's basis for the denial.

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., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, although the share certificate and ledger were both submitted, the petitioner failed to submit evidence of the payment for these shares as requested by the director. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include wire transfers or other financial documents evidencing the transfer of money from the foreign entity to the petitioner. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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).

As stated by the director in the denial, merely outlining the foreign entity's alleged financial interest in the petitioner, without documentation to corroborate the claim, is simply insufficient to show that the petitioner actually received consideration for the shares allegedly issued to the foreign entity. 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)). On appeal, counsel merely repeats these claims which were previously deemed insufficient by the director. 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. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

The AAO concurs with the director's finding that without evidence to show that the shares were actually acquired by the foreign entity in exchange for a monetary contribution, the critical element of ownership has not been established. However, the AAO notes another problem not addressed by the director. The share certificate included in the record is dated September 9, 2005. The petition in this matter was filed on May 27, 2005. According to the stock certificate and accompanying ledger, the foreign entity, if in fact it had paid for

the shares, did not acquire its interest in the petitioner until nearly three months after the filing of the petition. As previously stated, 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). Since the foreign entity did not own any shares in the petitioner as of the date of filing, a qualifying relationship could not have existed at that time. 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.