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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

D-7

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File: WAC 08 092 50380 Office: CALIFORNIA SERVICE CENTER

Date: SEP 02 2008

IN RE: Petitioner:  
Beneficiary:

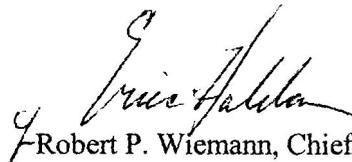


Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

**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 in the position of president to open a new office 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 petitioner is a corporation that was organized in the State of Washington for the purpose of engaging in the business of airline ticket sales.

The director denied the petition on the basis of two independent grounds of ineligibility: 1) the petitioner failed to establish that the United States operation would support an executive or managerial position within one year; and 2) the petitioner failed to establish that it had formed a qualifying relationship with the beneficiary's foreign employer.

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, the petitioner apologizes for having misunderstood the prerequisites for an L-1A visa and provides documentation showing that it has made various alterations in an effort to establish eligibility for the immigration benefit sought.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that 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, 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 (l)(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.

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.

The first issue in this matter is whether the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In support of the Form I-129, the petitioner provided a letter dated January 22, 2008, stating only that the beneficiary has been transferred to the United States to be the petitioning entity's director and president. The petitioner provided no statements regarding the beneficiary's proposed job duties. Accordingly, on February 21, 2008, Citizenship and Immigration Services (CIS) issued a request for additional evidence (RFE) instructing the petitioner to provide documentation to establish that it would support the beneficiary in a primarily managerial or executive capacity within one year of the petition's approval. Specifically, the petitioner was asked to discuss the proposed number of employees it intended to employ and the types of positions they would occupy.

In response, the petitioner provided various letters addressing the concerns listed in the RFE. Among the petitioner's submissions was a letter dated March 21, 2008 in which the petitioner stated that it currently has one employee, i.e., the beneficiary, and that by the summer of 2008 it planned to have one more employee from the foreign entity. The petitioner also stated that it currently has three designated ticket agents in the United States. In a separate submission, which was also dated March 21, 2008, the petitioner stated that 90% of the beneficiary's time would be spent in sales, 5% would be spent in marketing for tourism and business to Russia, and the remaining 5% of the beneficiary's time would be spent doing administrative work.

On April 4, 2008, the director issued a decision denying the petitioner's Form I-129. The adverse decision was based, in part, on the director's determination that the petitioner failed to establish that it would support the beneficiary in a primarily managerial or executive position after one year of operation as a new office.

On appeal, the petitioner asserts that by June 2008 it intends to employ a new staff with at least three years of experience. The petitioner states that the beneficiary intends to train "him/her" so that he may be relieved from having to perform non-qualifying tasks. However, the petitioner does not explain how a single employee would relieve the beneficiary from having to primarily perform non-qualifying, operational tasks on a daily basis, nor does the petitioner provide any information as to the job duties the new employee would perform and how the additional employee would impact the beneficiary's job duties after the petitioner's first year of operation. The AAO notes that its consideration of the size of the petitioner's staff is supported by federal courts, where it has been generally determined that CIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Thus, in light of the petitioner's projected organizational make-up at the end of its first year of operation coupled with the petitioner's failure to provide a sufficiently detailed description of the proposed employee's job duties and the job duties of the beneficiary, it is unlikely that the petitioner would be able to transform the beneficiary's position from one that almost entirely consists of non-qualifying tasks to one that would primarily consist of tasks within a managerial or executive capacity.

It is further noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. See 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. See *Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new

commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

*Id.*

In the present matter, the petitioner has failed to provide an adequate business plan or other documentation that would support a finding that the U.S. entity would progress to a stage of development where the petitioner would have a genuine need for an employee who would perform in a managerial or executive capacity. Nor has the petitioner provided a description of the specific daily tasks the beneficiary would perform subsequent to the hiring of an additional employee such that the AAO can conclude that after one year of operation, the beneficiary's scope of job duties would be limited such that the primary portion of the beneficiary's time would be allotted to duties within a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

The second issue in this proceeding is whether the petitioner has established that it and the foreign employer are qualifying organizations.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "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" and "is or will be doing business." "Subsidiary" is defined in pertinent part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

In the present matter, the petitioner claims that it is a subsidiary of the beneficiary's foreign employer, which is located in Tokyo, Japan. This claim is reiterated in a letter dated January 28, 2008, which the petitioner provided in support of the Form I-129. Although the petitioner also provided its certificate of incorporation, its articles of incorporation, and corporation information regarding the entity claiming to be the petitioner's parent, these documents are insufficient to corroborate the petitioner's claim regarding its ownership.

The director recognized this deficiency and addressed it in the RFE by instructing the petitioner to provide additional documentation, including the following: 1) proof of the foreign parent company's payment for its ownership of the U.S. entity in the form of cancelled checks, original wire transfers and bank deposit receipts showing the U.S. entity's receipt of the foreign entity's monetary consideration; 2) minutes of the meeting for the U.S. entity listing the stock holder(s) and the number and percentage of shares owned; 3) the U.S. entity's stock

certificates identifying by name the company's stockholder(s); 4) the U.S. entity's stock transfer ledger showing all stock certificates that have been issued; and 5) documents showing the petitioner's total offering amounts.

The petitioner's response included a letter dated March 21, 2008 in which [REDACTED] the foreign entity's president, stated that the foreign entity has not invested in the U.S. petitioner, but rather has extended a loan to the U.S. entity in the amount of \$18,000. [REDACTED] speculated that based on his forecast of the petitioner's 2008 earning potential, he expected that the petitioner would be able to repay the loan amount without difficulty. Mr. [REDACTED] made no indication that there was a monetary exchange in return for the foreign entity's ownership interest in the U.S. entity. In fact, the petitioner provided an actual document (entitled "Ongoing Basic Loan Agreement") memorializing the lender/borrower relationship between the foreign and U.S. entities based on the foreign entity's extension of a loan in the exact amount of \$18,659.90 effective January 16, 2008.

The petitioner also provided its list of owners, naming the beneficiary's foreign employer as its sole stockholder. This document was accompanied by a stock certificate, which issued 10,000 shares of the petitioner's stock to the foreign entity claiming to be the sole stockholder. In another document, dated January 15, 2008 and entitled "Unanimous Consent Resolutions of Board of Directors of [the petitioner]," the petitioner resolved to issued 10,000 shares of its stock in exchange for the foreign entity's "commitment to pay the organizational expenses of the corporation in the amount of ONE THOUSAND DOLLARS (\$1,000)." Despite CIS's specific request for proof of payment in exchange for the issuance of stock, the petitioner did not provide corroborating evidence showing that monetary consideration had been received by the petitioner in exchange for its stock issue. It is noted that 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).

In the director's April 4, 2008 denial of the petition, the director determined that the petitioner failed to establish that it has formed a qualifying relationship with the beneficiary's foreign employer. The director specifically addressed the March 21, 2008 letter and the "Ongoing Basic Loan Agreement" neither of which indicates that the petitioner has in any way been compensated for the issuance of its stock. The director also discussed the board resolution in which the foreign entity agreed to pay \$1,000 for the petitioner's organizational expenses in exchange for the petitioner's stock. Specifically, the director noted that the petitioner failed to assign a value to its no par value stock to account for capital used to fund the U.S. entity.

On appeal, the petitioner provides evidence of remedial steps that were taken subsequent to the director's adverse findings. Specifically, the petitioner provides evidence of a new board resolution dated April 18, 2008 in which the board agreed to issue another 200,000 shares of stock in exchange for \$20,000 and resolved that the value of its stock would be ten cents per share. The petitioner also provided a bank receipt dated "4/23" showing the U.S. entity as the recipient of \$20,000.<sup>1</sup> These documents were accompanied by a stock certificate issuing 200,000 shares of the petitioner's stock to the foreign parent entity.

While the new documents submitted on appeal suggest that a qualifying relationship was ultimately created between the beneficiary's U.S. and foreign employers, this relationship was only created after the Form I-129 was

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<sup>1</sup> It is noted for the record that while it appears that the fund transaction took place in 2008, the year does not appear in the provided document.

filed and therefore cannot be considered in the course of adjudicating the present petition, as 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).

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; *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, the petitioner failed to establish that it was a qualifying organization at the time the Form I-129 was filed. While the newly created qualifying relationship may be the basis for a subsequent Form I-129 petition, it cannot be considered for purposes of determining the petitioner's eligibility for the current Form I-129. As previously discussed, the documentation on record at the time of filing failed to establish the existence of a qualifying relationship between the U.S. and foreign entities. Therefore, based on this second ground, the instant petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003).

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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.