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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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File: EAC 08 034 51111 Office: VERMONT SERVICE CENTER Date: **FEB 24 2010**

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: 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New Jersey limited liability company, states that it is engaged in business contracting and marketing. It claims to be a branch or subsidiary of [REDACTED] located in Israel. The petitioner seeks to employ the beneficiary in the position of marketing manager for a period of three years.

The director denied the petition concluding that the petitioner failed to establish that the U.S. company has a qualifying relationship with the foreign entity. In denying the petition, the director emphasized that the petitioner failed to submit requested evidence to document the ownership and control of the U.S. and foreign entities.

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 states that it is a wholly-owned subsidiary of the beneficiary's foreign employer. The petitioner submits a copy of its membership certificate #20, which indicates that 20 membership units were issued to [REDACTED] on May 28, 2004.

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.

The sole issue to be addressed is whether the petitioner established that the U.S. company and the foreign entity have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

(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 (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[.]

* * *

(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.

The petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the U.S. company was established in 2001 and is a branch office of [REDACTED] located in Israel. Where asked to describe the

stock ownership and managerial control of each company, the petitioner only listed the U.S. company's name and U.S. tax identification number. The petition was filed on November 15, 2007 without the required initial evidence or other supporting documentation.

Accordingly, on January 23, 2008, the director issued a request for additional evidence (RFE), in which he requested, *inter alia*, that the petitioner submit copies of all share certificates, stock ledgers or other evidence documenting ownership and control of the U.S. and foreign entities. The director also requested evidence of the ownership and control of each parent, subsidiary and affiliate organization of the foreign organization, including but not limited to stock certificates, stock ledgers, articles of incorporation, or joint venture agreements. Finally, the director requested evidence that the foreign entity is presently engaged in the regular, systematic and continuous provision of goods and services, as well as an explanation of the type of business operated in Israel. The director noted that the petitioner should submit evidence of recent business activities such as purchase contracts, purchase orders, sales invoices, the foreign entity's telephone and fax numbers, and photographs of the foreign entity's business premises.

In response, the petitioner submitted an on-line telephone listing for [REDACTED] in Be'er Sheva, Israel. The petitioner also submitted what appears to be a business registration with the Israeli tax authorities under the name [REDACTED]. Finally, the petitioner submitted a recent electric bill issued to [REDACTED] and a blurry copy of a photograph depicting a business with an illegible company sign.

The director denied the petition on December 16, 2008, concluding that the petitioner failed to establish that the U.S. company and the foreign entity have a qualifying relationship. In denying the petition, the director noted that the petitioner failed to address his specific request for documentary evidence of the ownership and control of both companies.

On appeal, the petitioner asserts that the U.S. company is a wholly-owned subsidiary of the foreign entity. In support of the appeal, the petitioner submits a copy of membership certificate #20 issued by "Champion Contracting Services Limited Liability Company" to [REDACTED] on May 28, 2004. The certificate indicates that the number of membership units issued is "Twenty (All)."

Upon review, the petitioner has not established that the U.S. and foreign entities have a qualifying relationship.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, membership certificates alone are not sufficient evidence to determine whether member maintains ownership and control of a limited liability company. The articles of organization, operating agreement and the minutes of relevant annual member meetings must also be examined to determine the total number of membership units issued, the exact number

issued to each member, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting powers of members, 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, USCIS is unable to determine the elements of ownership and control.

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).

Where, as here, 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). The record before the director contained no documentary evidence of the ownership of the U.S. company, despite the director's specific request for such evidence. Therefore, the petition was properly denied.

If the petitioner had wanted its membership certificate to be considered, it should have submitted the document in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Regardless, the single membership certificate submitted on appeal would be insufficient to corroborate the petitioner's claim that the foreign entity is currently the sole owner of the petitioning company. The director specifically requested copies of *all* stock or membership certificates issued to date and a copy of the petitioner's articles of incorporation, or in this case, articles of organization. The evidence of record does not contain evidence of the total number of membership units authorized or copies of membership certificate numbers 1 through 19. 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)).

Finally, the AAO notes that the petitioner has not submitted sufficient evidence to establish that the foreign entity continues to do business in Israel. The director specifically requested documentation of business activities conducted during the year preceding the filing of the petition, such as copies of sales invoices, purchase orders or other concrete evidence of business transactions. The petitioner failed to submit any such evidence, nor did it submit clear photographs clearly depicting the foreign business in operation, which were also requested by the director. The fact that the foreign entity maintains a telephone number is insufficient to establish that the company is engaged in the regular, systematic and continuous provision of goods or services. For this additional reason, the petitioner has not established that there is a qualifying relationship between the U.S. and foreign entities. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

Beyond the decision of the director, the petitioner has not established that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity as those terms are defined at section 101(a)(44)(A) and (B) of the Act. The petitioner stated on Form I-129 that the beneficiary will perform the following duties as marketing manager for the U.S. entity:

Develop pricing strategies, balancing firm objectives and customer satisfaction. Identify, develop and evaluate marketing strategy, evaluate the financial aspects of product development, direct the hiring, training and performance evaluations, negotiate [sic] contracts with vendors and distributors to manage products distribution, establishing distribution networks and developing [sic]

In the request for evidence, the director instructed the petitioner to submit a breakdown of the number of hours to be devoted to each of the beneficiary's proposed job duties on a weekly basis, an organizational chart for the U.S. entity, and complete position descriptions for all of the United States entity's employees.

In a letter dated April 10, 2008, the petitioner provided the following position description for the beneficiary's proposed position:

[The beneficiary] is in charge of sales and marketing operations of company which deals with business contracting and marketing and related services, budgeting and advertising, ensure sales persons (2) comply with company policy. He will also develop pricing strategies, balancing firm objectives and customer satisfaction. Identify, develop and evaluate marketing strategy, evaluate the financial aspects of product development, direct the hiring, training and performance evaluations, negotiate contracts with vendors and distributors to manage products.

The petitioner indicated that the salespersons "sell products of company according to rules and standards of company." The other company employees identified by the petitioner are a president, a vice president, a general manager, and a secretary.

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.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

Here, the petitioner has provided only a brief description of the beneficiary's duties which is insufficient to establish that he will be engaged in primarily managerial or executive functions. The director reviewed the initial description, found it to be inadequate to establish the beneficiary's eligibility, and therefore reasonably requested a complete description of the amount of time the beneficiary would allocate to specific duties on a weekly basis. In response to the director's explicit request, the petitioner re-submitted essentially the same brief list of job duties, and neglected to provide the requested breakdown of the job description. Therefore, based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923

F.2d 175, 177 (D.C. Cir. 1991). Again, any 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).

Furthermore, the petitioner has not clearly described or documented the type of business operated by the U.S. company. The petitioner indicated on Form I-129 that the type of business is "business contracting and marketing." Although it is not clear from this vague description what the company does, it is reasonable to assume that it is a service-oriented company, and not a business that is engaged in product development, product sales or distribution. Nevertheless, the petitioner indicates that the beneficiary performs duties associated with product development, establishing distribution networks, and managing products distribution. The beneficiary's proposed duties appear to be inconsistent with the stated nature of the business, at least within the limited context provided by the petitioner. The record contains no evidence of business activities conducted by the U.S. company.

Overall, there is insufficient evidence to support a conclusion that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. For this additional reason, the petition cannot 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). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th 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.

ORDER: The appeal is dismissed.