

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D7

DATE: **MAY 31 2011** Office: VERMONT SERVICE CENTER FILE:

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)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:
Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. 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 a 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 Delaware limited liability company established in June 2007, intends to operate a computer equipment sales and distribution company. It claims to be a subsidiary of [REDACTED]. The petitioner seeks to employ the beneficiary as the Managing Director and Chief Executive Officer of its new office in the United States for a period of two years.¹

The director denied the petition concluding that the petitioner failed to establish: (1) that it had secured sufficient physical premises to house the new office; and (2) 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.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petitioner established that the premises secured for the new office are sufficient by demonstrating that it is currently conducting business from such premises. With respect to the beneficiary's foreign employment, counsel asserts that the beneficiary, since his initial admission to the United States in F-1 status on August 23, 2002, "has constantly traveled to Trinidad and Tobago and has returned to his managerial duties at the foreign company while outside of the United States," and has been continuously employed by [REDACTED] in salary based compensation." Counsel submits a brief and additional evidence in support of the appeal.

I. The Law

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(1)(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 (1)(1)(ii)(G) of this section.

¹ Pursuant to 8 C.F.R. 214.2(1)(7)(3) if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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 involves 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.

II. The Issues on Appeal

A. Sufficient Physical Premises to House the New Office

The first issue addressed by the director is whether the petitioner established that it has secured sufficient physical premises to house the new office, as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

Evidence of the physical premises secured for the new office is required initial evidence for a petition filed pursuant to 8 C.F.R. § 214.2(l)(3)(v). Therefore, the critical facts to be examined are those that were in existence at the time of filing the petition. It is a long-established rule in visa petition proceedings that a petitioner must establish eligibility as of the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on March 31, 2008. In support of the petition, the petitioner submitted a lease agreement for the premises located at [REDACTED]. According to the terms of the lease, the premises were leased to the beneficiary and his immediate family "for occupancy only as a private dwelling, and for no other use and to no other parties." The petitioner submitted evidence that the beneficiary filed a document with the Town of Brookline declaring that the petitioning entity operates a business from this address.

The petitioner also submitted a business plan in support of the petition. The business plan does not discuss the type of space secured for the business or the petitioner's space requirements. According to the initial business plan, the petitioner intends to employ a total of five workers during the first year of operations.

The director issued a request for additional evidence ("RFE") on April 7, 2008, in which the director noted that the lease agreement provided is for a private dwelling. The director requested that the petitioner submit evidence that it has secured sufficient physical premises to house the new office, including evidence demonstrating that such premises are sufficient for conducting international trade. The director advised that the evidence submitted should include, but is not limited to, original lease agreements, a statement from the petitioner's lessor identifying the square footage of the leased premises, and the telephone numbers of the petitioner's lessor. The director also requested photographs of the interior and exterior of all premises that have been secured for the United States entity.

In response to the RFE, the petitioner re-submitted a copy of the beneficiary's residential lease, along with a storage unit rental agreement made between the beneficiary and [REDACTED]. The agreement is dated March 6, 2008, and the space rented is a 5 by 10ft. storage unit with a monthly rent of \$70.

The petitioner submitted photographs of the exterior of an apartment building, the door to [REDACTED] and some interior photographs of an apartment which includes a room with two computer workstations, and a piece of standard office paper pinned to the wall that bears the petitioner's company name. The petitioner also provided a proposed organizational chart for the U.S. company which indicates a proposed staff of 13 employees. According to the chart, the petitioner has filled three positions, including an administrative assistant, a marketing executive and an online store manager.

The director denied the petition on July 16, 2008, concluding that the petitioner failed to establish that it had secured sufficient physical premises to house the new office. In denying the petition, the director noted three

deficiencies: (1) the record does not establish that the beneficiary can conduct business from his apartment or that the apartment can accommodate employees; (2) the storage unit lease agreement does not indicate the size of the unit or state that the petitioner can conduct business from the premises; and (3) the photographs submitted merely show the beneficiary's apartment arranged so as to show 'business' work stations.

On appeal, counsel, relying on *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm'r 1971), asserts that "it has been determined that the determining factor for 'sufficiency of physical premises' is evidence that 'the petitioner has acquired physical premises necessary to its functions . . . which evidences the bona fides of its intended operation in this country.'" Counsel asserts that "although the beneficiary has a 'private dwelling,' the evidence of record establishes that the U.S. entity has been conducting business since the date of establishment, and that this is "clear and convincing evidence that the company can conduct business and that the physical premises are sufficient for its functioning." Counsel asserts that "the photos for the beneficiary's apartment have been arranged to show business work station because it is used as a business work station."

In support of the appeal, the petitioner submits documentation reflecting that the petitioner is engaged in the purchase and sale of computer and electronic equipment, through operation of an eBay store and other means. The petitioner also submits photographs of its storage unit and the items stored there.

Upon review, counsel's assertions are not persuasive. The petitioner has not submitted evidence that it has secured adequate physical premises to house the new office.

The AAO acknowledges that the regulations do not specify the type of premises that must be secured by a petitioner seeking to establish a new office, and observes that there may be cases in which a home office would satisfy the regulatory requirements. However, the petitioner bears the burden of establishing that its physical premises should be considered "sufficient" as required by the regulations at 8 C.F.R. § 214.2(l)(3)(v)(A). To do so, it must clearly identify the nature of its business, the specific amount and type of space required to operate the business, its proposed staffing levels, and evidence that the space can accommodate the petitioner's growth during the first year of operations. USCIS may also consider evidence that the company has obtained a license to operate the business from a home office, if required, evidence that the landlord has authorized the use of residential space for commercial purposes, evidence that the company has established separate phone lines or made other accommodations for the use of the premises by the U.S. company, or any other evidence that would establish that a residential dwelling will meet the company's needs. Finally, photographs and floor plans of the leased premises may assist in determining that the premises secured are sufficient to accommodate the petitioner's business operations.

Here, the petitioner has not offered any additional evidence on appeal to show that the specific premises secured are sufficient to accommodate the petitioner's intended business. As noted by the director, the lease agreement was entered by the beneficiary in his personal capacity, for a dwelling to be occupied by him and his immediate family, and the lease expressly prohibits any other use of the premises. The petitioner has not provided evidence that the landlord has granted the petitioner authorization to operate the business from the beneficiary's home or that the petitioner has obtained any applicable licenses required to operate a electronics sales and distribution business from a private home. 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'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

While the petitioner has submitted evidence that it also leases a small storage unit, the petitioner is clearly not able to use this space for any other purpose than storage of its products. The beneficiary's home office may be sufficient to accommodate limited business activities undertaken by the beneficiary to date; however, the petitioner claims that it has already hired three additional staff and intends to employ at least five and up to 11 workers. Even if the petitioner had established that it is authorized to conduct a business from the beneficiary's apartment, the maximum occupancy of the premises secured is two people. The space secured may be sufficient for the purposes of conducting eBay transactions, but it is clearly not sufficient to accommodate the proposed staff and scope of operations the petitioner anticipates for its first year in operation.

The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

B. One-year of full-time continuous employment abroad

The second issue addressed by the director is whether the petitioner submitted evidence 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 8 C.F.R. § 214.2(l)(3)(iii).

In a letter submitted in support of the petition, counsel stated that the beneficiary "has at least seven years of experience working with [REDACTED]" which is claimed to be a wholly-owned subsidiary of [REDACTED]. Counsel indicated that the beneficiary was employed by the foreign entity as "Chief Operations Assistant" responsible for initiating contracts, delivering and installing computers, solving problems, and ensuring that payments were received on time and equipment was returned in good condition.

The petitioner submitted copies of the beneficiary's Forms TD-4, Return of Emoluments Paid and Pay Deducted" for the years 2003 through 2007. The forms were issued by The [REDACTED], and indicate that the beneficiary was paid as a regular, salaried employee, for 52 weeks each year. Counsel stated that this entity is the parent company of [REDACTED].

The petitioner also submitted a copy of the beneficiary's resume. According to the resume, the beneficiary graduated from [REDACTED] with a Bachelor's degree in January 2007, and since that time has been employed by the petitioner and another U.S. company, [REDACTED]. The beneficiary states in his resume that he was employed by [REDACTED] from January 2003 until December 2007, with [REDACTED] from November 2005 until April 2007, and with [REDACTED] from January to May 2003. The record shows that the beneficiary was last admitted to the United States in F-1 status in December 2006.

In the RFE issued on April 7, 2008, the director requested additional evidence to establish that the beneficiary has been employed abroad in a full-time managerial or executive capacity for one continuous year within the three years preceding his last entry to the United States.

In response to the director's request, the petitioner re-submitted copies of the beneficiary's Forms TD-4 for the years 2003 through 2007, along with an organizational chart indicating that the beneficiary's foreign job title was "Executive Manager." The petitioner submitted a description for this position that was significantly different than that previously provided for the "Chief Operations Assistant" position. The petitioner's response to the RFE also included a letter dated August 26, 2002 from [REDACTED]'s International Students and Scholars Office confirming that the beneficiary was enrolled in a full-time course of study as of that date.

The director denied the petition concluding that the petitioner failed to submit evidence that the beneficiary was employed by a qualifying foreign entity on a full-time basis for at least one continuous year within the three years preceding the beneficiary's last entry to the United States.

In denying the petition, the director noted that the beneficiary has been in the United States in F-1 status since August 2002, not including trips outside the United States for breaks. The director noted that the beneficiary's Trinidad and Tobago Forms TD-4, indicating that he worked 52 weeks per year in Trinidad and Tobago in the years 2003 through 2007, are contradicted by evidence showing that the beneficiary maintained F-1 status as a full-time university student in the United States. The director emphasized that "it is not clear how the beneficiary would have a full year of experience as an executive or manager while attending school in the United States."

The director further found that the petitioner's response to the RFE contained no explanation of how the beneficiary obtained the required one year of continuous work experience abroad. The director found no evidence to establish that the beneficiary was employed full-time for one continuous year by a qualifying foreign entity prior to the filing date of March 1, 2008 or prior to August 2002 when the beneficiary was first admitted to the United States as a student.

On appeal, the petitioner submits copies of the beneficiary's Forms TD-4 for 2001 and 2002, indicating that he received a salary from [REDACTED] during those years. Counsel asserts that such evidence demonstrates that the beneficiary had one year of continuous employment with the foreign entity prior to his first date of entry as an F-1 nonimmigrant student.

With respect to the director's observation that the beneficiary's tax forms indicate that he worked for the foreign entity for 52 weeks each year between 2003 and 2007, counsel states:

The Beneficiary has constantly traveled to Trinidad and Tobago and has returned to his managerial duties at the foreign company while outside of the United States. The Beneficiary has been continuously employed by the [REDACTED] in salary based compensation. The "salary compensation" which the Beneficiary was paid states

that the weeks of work could have been less than the amount noted on the return date. The tax form has the individual enter the pay periods that the "annual salary" covers, but not necessarily the number of weeks during which work was performed.

Upon review, the petitioner has not submitted evidence on appeal to overcome the director's determination. The petitioner has not established that the beneficiary was employed by a qualifying organization abroad on a full-time basis for at least one continuous year in the three years preceding the filing of the petition, as required by 8 C.F.R. 214.2(l)(3)(iii). We further find that the petitioner failed to establish that the beneficiary has been employed by a qualifying foreign entity in a primarily managerial or executive capacity. 8 C.F.R. §§ 214.2(l)(3)(iv) and (l)(3)(v)(B).

In this case, the beneficiary was authorized for employment with the petitioner in F-1 optional practical training status, and the petitioner indicates that the beneficiary was employed by the petitioner since March 2007, although the petitioner was not registered as a limited liability company until June 2007. Pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(A), periods spent in the United States in a lawful status for a branch of the same employer or a parent, affiliate or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad, but such periods shall not be counted toward fulfillment of that requirement. Therefore, any period of authorized employment with the petitioner, while not interruptive of the beneficiary's employment with the foreign entity, does not count toward fulfillment of his qualifying year of employment abroad.

Although counsel indicates that the beneficiary was "constantly" traveling to Trinidad and Tobago to assume managerial duties while maintaining a full-time course load as an undergraduate student at [REDACTED], the petitioner has not provided evidence that the beneficiary ever left the United States for a full year to work for the foreign entity, such that his employment would be considered both full-time and continuous at any point during his period of authorized F-1 status, which was granted from August 2002 through January 31, 2008. Therefore, even though it appears that the beneficiary received a salary from a claimed qualifying entity during the years 2003 to 2007, the beneficiary could not have accrued his one year of continuous full-time employment experience with the foreign entity if he was physically present in the United States during the greater portion of each of these years.

The petitioner claims for the first time on appeal that the beneficiary was employed by a qualifying foreign entity in 2001 and 2002, and therefore acquired his continuous year of full-time qualifying experience prior to his initial entry to the United States as an F-1 student. The petitioner offers no explanation as to why this period of employment was not mentioned previously in any statement from the petitioner, counsel, the foreign entity or the beneficiary. Furthermore, counsel offers no additional explanation with respect to the beneficiary's claimed job titles and duties during this alleged period of employment. We note that the beneficiary was 17 years old for the majority of 2001 and the beneficiary lists no employment prior to 2003 on his detailed resume. Even if the AAO were persuaded that the beneficiary were employed by the foreign entity on a full-time basis for a continuous year in 2001 and 2002, the evidence would be insufficient to establish that such employment was in a qualifying managerial capacity.

In addition, we note that the record contains additional inconsistencies regarding the beneficiary's dates of employment, job titles, job duties, and level of authority within the foreign entity which make it impossible to properly analyze this issue. As noted above, the petitioner changed the beneficiary's overseas job title and

level of authority from "Chief Operations Assistant," a position that did not appear to involve any managerial or executive duties, to that of "Executive Manager" without explanation. 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).

Given the facts presented and the discrepancies noted above, the AAO cannot conclude that the beneficiary was employed by the foreign entity in a managerial or executive capacity, that he was employed by the foreign entity on a full-time basis for a continuous year during the relevant three-year time period, or that he was ever employed by the foreign entity on a full-time basis for a continuous year. The beneficiary's actual job titles, job duties, dates of full-time continuous employment and level of authority within the foreign entity have not been resolved. For this additional reason, the appeal will be dismissed.

C. *Qualifying Relationship*

Beyond the decision of the director, a remaining issue is whether the petitioner established that the U.S. entity has a qualifying relationship with the beneficiary's claimed foreign employer. 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 petitioner has claimed that the beneficiary's foreign employer is [REDACTED], and submitted evidence that a different entity, The [REDACTED] has paid his salary. Based on the documentary evidence submitted, it appears that both of these foreign entities are owned in equal shares by [REDACTED].

The petitioner claims that the beneficiary owns a 51 percent interest in the U.S. company, while the remaining 49 percent interest is held by [REDACTED]. The record contains a [REDACTED] [REDACTED], which identifies the beneficiary and [REDACTED] as the owners of the company. The petitioner also submitted share certificates indicating that the U.S. company is authorized to issue 1000 shares, of which the beneficiary holds [REDACTED] [REDACTED]. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not submitted consistent claims or evidence regarding its ownership.

Regardless, the petitioner has consistently claimed that the beneficiary owns a majority interest in the U.S. company. If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. Here, the petitioner has not claimed that the beneficiary owns any interest in either foreign entity. The entities are not "owned and controlled by the *same group of individuals*, each individual owning controlling approximately the same share or proportion of each entity" 8 C.F.R. § 214.2(l)(1)(ii)(L)(2)(emphasis added). In addition, there is no parent entity with ownership and control of

both the foreign and U.S. companies that would qualify the two as affiliates. Although it appears that all of the companies involved are owned by members of the same family, this familial relationship does not constitute a qualifying relationship under the regulations. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis).

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.