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

b7

[redacted]

DATE: MAR 15 2012 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 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 Kansas corporation established in September 1996, states that it operates a railway speed and control technology research and manufacturing business. The petitioner claims to be a subsidiary of , located in Harbin, China. The petitioner seeks to employ the beneficiary as the vice president, operations of its office in the United States.

The director initially approved the petition and granted the requested status on February 11, 2009. On February 5, 2010, the director issued a notice of intent to revoke the approval, pursuant to 8 C.F.R. § 214.2(l)(9)(iii)(A)(*5*), based on a finding that the approval of the petition involved gross error. The director instructed the petitioner to submit additional evidence or arguments in rebuttal of the issues raised in the notice of intent to revoke. The petitioner submitted rebuttal evidence on March 5, 2010.

The director revoked the approval of the petition on March 15, 2010, concluding that the petitioner failed to establish that the United States and foreign entities are qualifying organizations.

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 states that copies of tax returns signed by the preparer and evidence that the amended tax returns were filed with the Internal Revenue Service (IRS) are enclosed. Counsel submits additional evidence on 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(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.

Under U.S. Citizenship and Immigration Services (USCIS) regulations, the approval of an L-1A petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B). Here, the director revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(*4*): "The statement of facts contained in the petition was not true and correct."

Upon review, and for the reasons discussed below, the AAO finds that the petition approval was properly revoked.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner has established that the United States and foreign entities are qualifying organizations. 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 pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (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.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 30, 2009. On the L Classification Supplement to Form I-129, the petitioner identified the beneficiary's last foreign employer as and stated that the companies have a subsidiary relationship based on the following description of the stock ownership and control of each company: is owned 100% by is 100% owned by

In a letter dated January 23, 2009, the petitioner described the relationship between the foreign and U.S. entities as follows: is a U.S. corporation incorporated under the laws of the State of Kansas in September 1996, and currently conducting business in Illinois and Kansas. It is a wholly-owned subsidiary of

In support of the petition, the petitioner submitted: (1) the business license and tax register certificate for indicating that the company is state-owned; (2) the articles of incorporation for indicating that the company is authorized to issue 20,000 shares of common stock at $1 par value; and (3) the U.S. company's 2006 and 2007 IRS Forms 1120, U.S. Corporation Income Tax Return, which identify of 75% of the company's shares and of 25% of the company's shares.

The petitioner failed to submit stock certificates, a stock ledger, or other evidence of ownership for the U.S. company. Nevertheless, the director approved the petition on February 11, 2009.

On February 5, 2010, the director issued a notice of intent to revoke the approval based on a finding that the petitioner and foreign entity do not in fact have a qualifying relationship. The director advised the petitioner as follows:

> Upon examining the petition, the record contains the petitioner's 2006 and 2007 Federal corporate tax returns. Statement 7 on the 2006 returns indicates that two individuals own 50% or more of voting stocks of the petitioner. and are shown as owning 75% and 25% of the petitioner's voting stocks, respectively. Statement 8 on the 2007 tax returns also indicates that and own 75% and 25% of the petitioner's voting stocks, respectively.
>
> Thus the statements of facts regarding the petitioner's ownership were not true and correct. The petitioner stated that it is 100% owned and controlled by a foreign company. The petitioner's 2006 and 2007 tax returns show that the petitioner is controlled by two individuals, not the foreign company.

In response, counsel for the petitioner submitted a brief letter stating the following: "Please note that the petitioner's outside accountant committed error in filing those tax returns. With this letter, the petitioner's amended Federal tax returns for 2008, 2007, 2006 and 2005 were enclosed for your record."

The petitioner submitted copies of IRS Form 1120X, Amended U.S. Corporation Income Tax Return, for 2005, 2006, 2007, and 2008 all indicating the following reason for the amendment:

> Errors on ownership disclosures on Schedule K and Form 5472
>
> . . . were incorrectly reported as 75% / 25% shareholders of [the petitioner] on the original Form 1120. In fact, those two individuals were the representatives of [the foreign company], which was a 100% shareholder of [the petitioner].

All four of the amended corporate tax returns identify of China as the sole shareholder of the U.S. company

The only signature completed on each of the amended Forms 1120X is that of the president of the petitioner, (the signature appears illegible but matches the signature on the employer letter submitted with the petition), on February 23, 2010. Each of the amended Forms 1120X indicate that the paid preparer of the forms is whose address is the same as the petitioner and who was the original preparer of the previously submitted Forms 1120 for the petitioner.

The director revoked the approval of the petition on March 15, 2010, concluding that the petitioner failed to establish that the petitioner and the foreign entity have a qualifying relationship. The director found that the submitted evidence was not sufficient to overcome the grounds for revocation. The director observed that the preparer, which is also the accounting firm the petitioner alleges committed errors, did not sign the petitioner's

amended tax returns for 2005, 2006, 2007, and 2008. The director further observed that the petitioner failed to provide evidence that the amended tax returns were actually filed with the Internal Revenue Service (IRS).

On appeal, counsel for the petitioner simply states:

> Copy of tax returns signed by the preparer were enclosed; Post office mail receipt and the petitioner's business bank account statement, proving the amended tax returns were filed by the petitioner with the Internal Revenue Service located at Ogden, UT 84201

The petitioner submits new copies of the amended tax returns for 2005, 2006, 2007, and 2008 complete with the preparer's signature, who according to the petitioner's organizational chart, is the finance director for the petitioner (a subordinate to the beneficiary). The preparer signed the amended returns on March 20, 2010, which is five days after the revocation of the petition approval. The petitioner also submits a bank statement and receipt from the Illinois post office, dated March 1, 2010, indicating that it mailed four large envelopes to Ogden, Utah on that date.

Discussion

Upon review, the petitioner has not established the requisite qualifying relationship between the petitioning company and the beneficiary's last foreign employer, which the petitioner has identified as

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'r. 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, 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, USCIS is unable to determine the elements of ownership and control.

While the petitioner's response to the director's notice of intent to revoke addressed one of the discrepancies in the record, several inconsistencies and omissions remain which raise questions regarding the actual ownership of the foreign and U.S. companies.

In response to the notice of intent to revoke and on appeal, counsel for the petitioner simply states that an outside accountant made errors on the petitioner's tax returns; however, the evidence on record suggests that the individual who signed as the preparer of the tax returns is not an outside accountant, but rather an employee of the petitioner and subordinate of the beneficiary. Furthermore, neither the petitioner nor the accountant who prepared the tax returns submitted an explanation as to how it managed to file multiple years of tax returns without noticing the claimed error. 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. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner stated in a letter that it is wholly-owned by the foreign entity. The petitioner failed to provide copies of the U.S. company's stock certificates, a stock ledger, or other primary evidence of ownership to establish this claimed qualifying relationship with 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'r 1998) *(citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The only secondary evidence of the U.S. company's ownership provided at the time of filing was in the form of corporate tax returns which indicated that the petitioner is owned by two individuals, [redacted] and [redacted] rather than by the foreign entity as claimed by the petitioner. 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).

Although the petitioner provided copies of amended tax returns after the director issued the notice of intent to revoke, the amended returns were not signed by the preparer until after the revocation, and the receipt submitted as evidence that the returns were filed with the IRS, is not sufficient to establish that the amended returns were received and accepted by the IRS. Like a delayed birth certificate, the amended tax returns submitted multiple years after the claimed transaction raise serious questions regarding the truth of the facts asserted. *Cf. Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings).

The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92. Simply asserting that the reported list of shareholders was a clerical error or mistake on the part of the accountant does not qualify as independent and objective evidence. Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

Based on the evidence submitted, the petitioner has not established that a qualifying relationship exists between the U.S. company and [redacted] The evidence on record does not corroborate the petitioner's claim that there is a qualifying parent-subsidiary or other relationship between the U.S. and foreign companies. As such, the

petitioner has not met its burden to establish that the U.S. and foreign entities have a qualifying relationship, and the appeal will be dismissed.

III. Conclusion

Based on the foregoing discussion, the AAO concurs with the director's conclusion that the statement of facts contained in the petition was not true and correct. The AAO therefore affirms the director's decision to revoke the approval of the petition based on the ground stated.

The AAO acknowledges that USCIS previously approved an L-1A nonimmigrant petition filed on behalf of the beneficiary. In matters relating to an extension of nonimmigrant visa petition validity involving the same petitioner, beneficiary, and underlying facts, USCIS will generally give deference to a prior determination of eligibility. However, the mere fact that USCIS, by mistake or oversight, approved a visa petition on one occasion does not create an automatic entitlement to the approval of a subsequent petition for renewal of that visa. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 148 (1st Cir 2007); *see also Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 597 (Comm. 1988). For example, if USCIS determines that there was material error, changed circumstances, or new material information that adversely impacts eligibility, USCIS may question the prior approval and decline to give the decision any deference.

Each nonimmigrant petition filing is a separate proceeding with a separate record and a separate burden of proof. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

In the present matter, the director reviewed the record of proceeding and concluded that the petitioner was ineligible for an extension of the nonimmigrant visa petition's validity. In both the notice of intent to revoke and the notice of revocation, the director clearly articulated the objective statutory and regulatory requirements and applied them to the case at hand. If the previous petition was approved based on the same minimal evidence of the petitioner's eligibility, the approval would constitute gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

The petition will be denied and the appeal dismissed for the above stated reasons. 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.