



U.S. Citizenship  
and Immigration  
Services

87

[REDACTED]

DATE: NOV 28 2012      Office: CALIFORNIA SERVICE CENTER      FILE: [REDACTED]

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:  
[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg  
Acting 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 to classify the beneficiary as an intracompany transferee (L-1A) 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 corporation established in 2010, intends to engage in the sale of green energy products. It claims to be a branch of [REDACTED], located in Bucheon City, Korea. The petitioner seeks to employ the beneficiary as the chief executive officer of the new office in the United States.

The director denied the petition based on a finding that the petitioner failed to establish that it has secured sufficient physical premises to house the new office.

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 contends that the director wrongly assumed that the petitioner's mailing address is a "virtual office." Counsel emphasizes that the petitioner operates a real company and currently has a staff of five full-time employees working in its leased premises.

#### 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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) further provides 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 in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (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. PHYSICAL PREMISES TO HOUSE THE NEW OFFICE

The sole issue addressed by the director is whether the petitioner established that it had secured sufficient physical premises to house the new office.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on May 27, 2010. The petitioner indicated its mailing address as [REDACTED] in San Diego, California, and stated that the beneficiary will work at this address. In a letter dated May 17, 2010, the petitioner's claimed parent company, [REDACTED], stated that the U.S. company plans to hire nine (9) employees in 2010.

The petitioner submitted a copy of its Office Service Agreement with Regus - [REDACTED] which indicated that the petitioner was authorized to use office number 63 for the period April 5, 2010 through October 31, 2010, for a monthly fee of \$800. The service agreement indicates that the office will be used by one person.

The director issued a request for evidence (RFE) on July 26, 2010 in which he instructed the petitioner to submit, *inter alia*, the following: (1) a copy of the U.S. company's floor plan for all spaces including office, warehouse and production, including the exact location of employees the company intends to hire within the first year; (2) color photographs of the U.S. business premises showing the interior and exterior of all workspaces; (3) a complete copy of the U.S. company's lease agreement identifying the total square footage of the premises secured; and (4) a letter from the building owner or management company confirming that the petitioner is actually occupying and maintaining its lease agreement, and stating the total square footage of the premises and the number of people the space can accommodate.

In response to the RFE, the petitioner submitted evidence that it had recently secured office #240 at the same address for the period September 1, 2010 through August 31, 2011, for a monthly fee of \$2,024. The agreement indicates the number of people using the office as "2." The petitioner also provided a letter from the Regus office suites center manager stating that the petitioner's newly leased office #240 can accommodate five workstations. The Regus manager stated that Suite 200 comprises a total of 3,140 square feet, including office #240.

The petitioner stated that it had four employees working in the office as of September 2010, and also stated that the leased space can accommodate five people. The petitioner noted that "when the company grows and needs more space, we will have to see which space is available or we could possibly move to a new office." The petitioner submitted a center floor plan showing the layout of offices within Suite 200, and photographs, including the company's name on the office suite directory, a photograph of an office with four to five desks and two to three employees present, and photographs of common areas such as meeting, copy and conference rooms.

The director denied the petition on October 18, 2010 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 determined that the initial lease agreement was for an office intended to accommodate only one employee, while the petitioner stated that it intends to hire nine employees during 2010 alone. The director emphasized that the petitioner failed to provide the square footage of its leased premises as requested in the RFE.

On appeal, counsel for the petitioner contends that the director incorrectly assumed that the petitioner has leased a "virtual office." Counsel states that the petitioner currently has a staff of five full-time employees working in [REDACTED] at the [REDACTED] location. Counsel states that the current office occupies 220 square feet and is capable of accommodating up to nine (9) employee workstations. In addition, counsel notes that the petitioning company and its employees have access to the business center's conference rooms, copy room, business lounge and other shared accommodations.

The petitioner submits a floor plan for office #235, a 16 by 16 foot office, showing a diagram with six computer workstations, as well as photographs showing the actual workstations that have been set up in the office. In addition the petitioner submits a placard with its company name on office #235.

Upon review, the petitioner has not established that it secured sufficient physical premises to house the new office.

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. 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'r. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971); *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r. 1998).

While the petitioner submitted an office services agreement at the time of filing, the agreement authorized the use of an office that appears to be able to accommodate a single employee. Therefore, the director reasonably requested additional evidence to establish that the amount and type of space secured was sufficient to accommodate the petitioner's claimed anticipated staff of nine to 10 employees.

The petitioner failed to submit any additional evidence regarding the initial physical premises in response to the RFE. Instead, the petitioner provided evidence that the company leased a different, apparently larger, space, one month after the RFE was issued. The purpose of the request for evidence is to elicit further information that clarifies whether the petitioner has established eligibility for the benefit sought as of the time the petition is filed. USCIS shall deny a petition where the petitioner submits evidence in response to a request for evidence that does not establish filing eligibility at the time the application or petition was filed. *See* 8 C.F.R. §§ 103.2(b)(1), (12).

Furthermore, while the AAO acknowledges that the petitioner has apparently moved to yet another office subsequent to its submission of the RFE response, the petitioner must still establish that it had satisfied the regulatory requirement at 8 C.F.R. § 214.2(l)(3)(v)(A) as of the date of filing the petition. 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'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The petitioner has not offered any evidence in support of the petition to demonstrate that the specific premise secured as of the date of filing the petition, in this case "Office #63," was sufficient to accommodate the petitioner's intended business. 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 petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

### III. ADDITIONAL ISSUES

Beyond the decision of the director, the petitioner has not established: (1) that the beneficiary has been employed abroad for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity; or (2) that the U.S. and foreign entities have a qualifying relationship.

#### A. Qualifying Year of Employment Abroad

The petitioner filed the Form I-129 on May 27, 2010 and indicated on the petition that the beneficiary has been employed by [REDACTED] since January 1, 2008. The petitioner described the beneficiary's duties as "new business development with financial budgeting."

On the Form I-129, the petitioner indicated that the beneficiary's last admission to the United States was on April 26, 2010 as a conditional permanent resident. The petitioner stated that the beneficiary was in the United States in H-1B status from July 10, 2002 until January 1, 2008.

In a letter dated May 17, 2010, [REDACTED] stated that the beneficiary "has been an executive at our company for more than one year." The petitioner submitted copies of the beneficiary's monthly pay slips issued to him by [REDACTED] for the period January 2009 through December 2009. The pay slips indicate the beneficiary's "date of starting employment" as "01/12/2008."

In the RFE issued on July 26, 2010, the director requested additional evidence to establish that the beneficiary has the requisite one year of continuous employment abroad within the three years preceding the time of filing the petition. Specifically, the director requested a clear color photocopy of the beneficiary's passport(s) used during the relevant time period.

The petitioner submitted copies of the beneficiary's current and previous passport and a list of his travel dates and destinations during the three years preceding the filing of the petition. The petitioner also submitted a second letter from [REDACTED] stated: "This letter is to verify that [the beneficiary] has been working with [REDACTED] since as early as June 2007." He indicates that the beneficiary initially "traveled around Asia in an executive capacity for our company to meet with and evaluate potential business partners and sourcing companies." [REDACTED] stated that the beneficiary became a "business development executive" from January 2008.

Prior to addressing the beneficiary's list of dates for the three years preceding the filing of the petition, the AAO emphasizes that the petitioner stated at the time of filing that it hired the beneficiary as an employee of [REDACTED] in January 2008, and the beneficiary's payroll documentation from the foreign entity confirms this information. While the subsequent letter from [REDACTED] indicates that the beneficiary began working for the company in June 2007, the petitioner has not provided sufficient evidence to corroborate this statement, particularly in light of the evidence submitted at the time of filing. 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). Here, the objective evidence, specifically the beneficiary's payroll records, indicates that he was hired by the foreign entity on January 12, 2008, not in June 2007.

In addition, where asked to indicate on the Form I-129 the beneficiary's prior periods of stay in the United States in an H or L status, the petitioner stated that the beneficiary's period of stay in H-1B status was "7/10/2002 to 1/01/2008." The beneficiary's passport entries indicate that he was admitted to the United States on June 5, 2007 and again on September 15, 2007 pursuant to an H-1B visa sponsored by [REDACTED] which undermines the petitioner's claim that he was a full-time employee of the foreign entity during the last six months of 2007.

Therefore, for the purpose of determining whether the beneficiary gained the required one year of continuous full-time employment abroad, the AAO will consider January 12, 2008 to be his start date for employment with the foreign entity. The beneficiary indicates that he spent most of his time (all but 19 days) outside the United States between January 12, 2008 and June 8, 2008. During this time, he traveled extensively between Korea and Hong Kong with only two entries to the United States. However, between June 8, 2008 and May 24, 2010, the date the petition was filed, the beneficiary indicates that he was physically present in the United States for 636 days.

Overall, the evidence confirms that the beneficiary did not work for [REDACTED] abroad for one continuous year in the three years preceding the filing of the petition. While the petitioner documented one full year of payroll records showing that the foreign entity paid him throughout 2009, the beneficiary cannot acquire one year of continuous employment with the foreign entity abroad if he spent the majority of his time physically present in the United States since commencing employment with the Korean company. The beneficiary has not been outside the United States for a total of 365 days subsequent to his hire date with the foreign entity.

Accordingly, the petitioner has not 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). For this additional reason, the petition cannot be approved.

#### B. Qualifying Relationship

The remaining issue to be discussed is whether the petitioner has established that a qualifying relationship exists with the beneficiary's overseas 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 indicated on Form I-129 that the U.S. company is a "branch" of [REDACTED] which it identified as its parent company. The petitioner stated in its letter dated May 20, 2010 that the foreign entity has contributed \$60,000 for the setup of the U.S. office.

The petitioner submitted a copy of the U.S. company's State of Delaware Certificate of Incorporation filed on March 26, 2010. The company's formation document indicates that it is authorized to issue 500,000 shares of common stock with par value of \$.01. The petitioner also provided copies of two deposit receipts indicating that the company received two deposits totaling \$60,000 to its Bank of America account on April 19, 2010 and April 29, 2010.

The submitted evidence is insufficient to establish that the U.S. company has a qualifying relationship with [REDACTED]

In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of [the foreign firm, corporation, or other legal entity]." 8 C.F.R. § 214.2(l)(1)(i) (emphasis added). The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). USCIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm'r 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm'r 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm'r 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm'r 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office).

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies of IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If, as here, the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). If the claimed branch is incorporated in the United States, USCIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer.

Here, the petitioner was incorporated as a Delaware corporation authorized to issue 500,000 shares of common stock. 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. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

The petitioner has not documented the ownership of the U.S. company by submitting copies of its stock certificates, stock transfer ledger, copies of relevant meetings of shareholders or any other relevant documentation. The petitioner submitted evidence that the petitioner received deposits totaling \$60,000 but did not provide documentary evidence of the source of these funds or evidence that the funds were used to pay for the foreign entity's investment in the U.S. company. 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)). 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); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

#### IV. CONCLUSION

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. v. United States*, 229 F. Supp. 2d at 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.