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U.S. Citizenship
and Immigration
Services

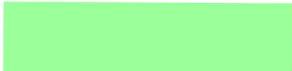


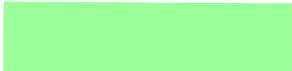
DATE: **FEB 05 2013**

Office: VERMONT SERVICE CENTER

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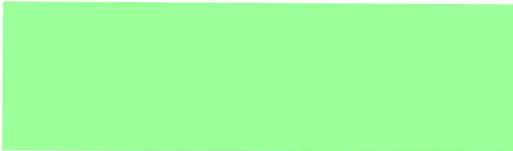
IN RE:

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 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, 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 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 York corporation established in May 2009, engages in the business of renting cars. It claims to be an affiliate of [REDACTED] "the foreign entity"). The petitioner seeks to employ the beneficiary as its general manager for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish the following: (1) that the beneficiary was employed abroad for one continuous year within three years preceding the filing of the petition in an executive or managerial position; (2) that the beneficiary would be employed in a primarily managerial or executive capacity in the United States; and (3) that the petitioner has a qualifying relationship to the foreign entity.

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 asserts that the documentation it previously submitted was sufficient to establish eligibility for the benefit sought. The petitioner 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(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.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

The 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 (I)(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.

* * *

(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.

II. The Issues on Appeal

A. Employment abroad

The first issue to be addressed is whether the petitioner established that the beneficiary was employed abroad for one continuous year within three years preceding the filing of the petition in an executive or managerial position.

On Form I-129, Petition for a Nonimmigrant Worker, the petitioner described the beneficiary's duties abroad as: "Direct, plan, and implement policies, objectives, and activities of car-rental company to ensure continuing operations, to maximize returns on investments, and to increase productivity. (See attached letter in support for details)." According to the attached letter referenced in Form I-129, the petitioner asserted, without elaboration, that the beneficiary has been continuously employed in an executive capacity since 2004

as the founder and General Manager of the foreign entity. In the same letter, the petitioner described the foreign entity's business model, the commencement of operations in the United States, why it was seeking the beneficiary's employment in the United States, and its proposal to temporarily employ the beneficiary. This letter provided no details regarding the beneficiary's job duties abroad.

The petitioner submitted a document entitled "Main Job Duties of [the foreign entity] in Moscow, Russia," which provided a brief description of the job duties for the foreign entity's employees. The only job description this document provided for the General Manager position was "general management and supervising of all departments and operations." The petitioner also submitted the foreign entity's organizational chart, which reflected the position of general manager at the top, directly overseeing the chief accountant, chief executive officer, and unit manager.

The director issued a request for evidence ("RFE") requesting, *inter alia*, the following: (1) payroll documentation establishing that the beneficiary was employed by the foreign entity in a managerial or executive capacity; (2) a letter from an authorized representative of the foreign entity articulating the managerial decisions made by the beneficiary on behalf of the foreign entity and describing the typical managerial responsibilities that were performed by the beneficiary abroad; and (3) a short answer explaining how many subordinate supervisors were under the beneficiary's management, the job titles and duties for the employees managed, the executive/managerial skills required to perform the overseas duties, the amount of time the beneficiary spent on executive/managerial duties versus non-executive/managerial duties, and the degree of discretionary authority in the day-to-day operations the beneficiary possessed.

In response to the RFE, the petitioner submitted corporate documentation establishing that the beneficiary is the sole shareholder of the foreign entity, and the beneficiary's individual tax return for 2010 in which he listed his occupation as "General Director." The petitioner then resubmitted copies of its previously submitted letter and the document entitled "Main Job Duties of [the foreign entity] in Moscow, Russia."

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary was employed abroad for one continuous year within three years preceding the filing of the petition in an executive or managerial position. In denying the petition, the director concluded that the petitioner's description of the beneficiary's duties, specifically "general management and supervising of all departments and operations," was vague and did not give any detailed description of the beneficiary's duties abroad.

On appeal, the petitioner asserts that the beneficiary was continuously employed abroad for over one year in an executive capacity as General Manager. The petitioner states that its previously submitted documents "clearly" demonstrated that the beneficiary's employment abroad was in an executive capacity.

Upon review of the record, the petitioner has failed to establish that the beneficiary was employed abroad for one continuous year within three years preceding the filing of the petition in an executive or managerial position.

In the instant matter, the petitioner has failed to provide any detailed, meaningful description of the beneficiary's job duties abroad. The petitioner's previously submitted documents, specifically its letter, the foreign entity's organizational chart, and the brief description of the foreign entity's employees, are insufficient to establish the beneficiary's executive employment abroad. The only description of the

beneficiary's job duties contained in these documents consists of a single statement: "general management and supervising of all departments and operations." This description is too vague and broad to give any meaningful insight into what the beneficiary's duties were on a daily basis.

The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Id.*

The organizational chart is insufficient to establish the nature of the beneficiary's employment abroad. Even though the beneficiary possessed the title of "general manager" and supervised other employees according to the organizational chart, the chart failed to provide any explanation of the beneficiary's actual duties in order to demonstrate the nature of his employment. The actual duties themselves reveal the true nature of the employment. *Id.* An individual will not be deemed an executive under the statute simply because he has an executive title.

In the RFE, the director specifically instructed the petitioner to provide additional evidence to establish the beneficiary's employment abroad in an executive capacity, including payroll evidence, a letter from an authorized representative of the foreign entity articulating the managerial decisions made by the beneficiary and describing his typical managerial responsibilities, and a short answer explaining the executive/managerial skills required to perform the overseas duties, the amount of time the beneficiary spent on executive/managerial duties versus non-executive/managerial duties, and the degree of discretionary authority in the day-to-day operations the beneficiary possessed. The petitioner failed to submit any of the requested evidence in response to the RFE. Instead, it resubmitted copies of its prior letter and the "Main Job Duties of [the foreign entity] in Moscow, Russia," which the director already found to be insufficient.

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).

Based on the foregoing reasons, the petitioner failed to establish that the beneficiary was employed abroad for one continuous year within three years preceding the filing of the petition in an executive or managerial position. Accordingly, the appeal will be dismissed.

B. Employment in the United States

The second issue to be addressed is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On Form I-129, the petitioner described the beneficiary's proposed job duties in the United States as the following: "Hire and supervise personnel. Negotiate and approve contracts and agreements with suppliers,

distributors, federal and state agencies, and other organizational entities. Purchase rental vehicle (See attached letter in support for details).”

According to the attached letter referenced in Form I-129, the petitioner asserted that it seeks to employ the beneficiary to oversee “the second stage of our growth and development, which will involve purchase of rental vehicle, recruitment of personnel, and advertising.” The petitioner asserted that the beneficiary would “devote virtually all of his time in the United States to the commencement and management of the U.S. business.” The petitioner also asserted that its employment offer to the beneficiary was temporary in nature. Other than these limited assertions, the petitioner’s letter provided no relevant details regarding the beneficiary’s proposed job duties in the United States.

The petitioner submitted a copy of its lease to [REDACTED]. The stated term of this lease was from June 1, 2011 through June 30, 2011. The petitioner also submitted various documents relating to the development of property located at [REDACTED] these documents indicate the property was purchased by [REDACTED] (represented by [REDACTED]). The petitioner also submitted copies of its bank account statements from January through February 2011.

The director issued a RFE requesting, *inter alia*, the following: (1) evidence that the U.S. business is engaged in the regular, systematic, and continuous provision of goods and services; (2) bank statements covering the last three months; (3) the petitioner’s latest U.S. federal income tax return; (4) evidence establishing that the petitioner has sufficient physical premises for the U.S. entity; (5) photographs of the interior and exterior of the U.S. premises; (6) a list of the U.S. employees that identifies each employee by name and position title, including a complete position description for all employees and a breakdown of the number of hours devoted to each of the employees’ duties on a weekly basis, including one for the beneficiary; and (7) an organizational chart/diagram depicting where the position of general manager fits into the U.S. organization.

In response to the RFE, the petitioner resubmitted a copy of its lease which ended on June 30, 2011. The petitioner resubmitted its previous letter “outlining” the beneficiary’s duties and responsibilities. The petitioner resubmitted copies of its bank account statements from January through February 2011. The only new evidence the petitioner submitted were documents relating to the purchase and development of property located at [REDACTED] these documents confirm the property was purchased by [REDACTED]. Other than the above, the petitioner submitted nothing else pertinent to the beneficiary’s job duties in the United States in response to the RFE.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in an executive or managerial position in the United States. In denying the petition, the director concluded that the petitioner failed to provide evidence establishing that it is presently engaged in the regular, systematic, and continuous provision of goods and services in the United States. The director noted the petitioner’s failure to provide requested evidence in response to the RFE, including bank statements covering the last three months, its income tax return, evidence of sufficient physical premises, photos of the U.S. business, a list of U.S. employees, and an organizational chart. The director concluded that, without this documentation, it cannot be determined that the beneficiary would be functioning at a managerial or executive level.

On appeal, the petitioner asserts that the beneficiary qualifies as an executive or manager for the U.S. entity. The petitioner asserts that it provided "extensive documentation" showing that it has already invested substantial funds in the U.S. entity "which confirms financial viability of our company." The petitioner asserts that it will provide additional funds to the U.S. entity for hiring and marketing. The petitioner also clarifies that it has modified its business focus to concentrate on providing rental vehicles to livery drivers and car services. The petitioner concludes that the beneficiary's responsibilities will be to hire managerial employees and supervise their performance, and will not be primarily involved in non-qualifying activity. On appeal, the petitioner provides new evidence including: its 2011 federal income tax return; licenses for its vehicles issued between July 2011 and April 2012; detailed bank account statements from January through March 2012; and lists of the petitioner's drivers and its fleet of vehicles.

Upon review of the record, the petitioner has failed to establish that the beneficiary will be employed by the United States entity in a managerial or executive capacity.

The petitioner has failed to provide any detailed, meaningful description of the beneficiary's proposed job duties in the United States. The only descriptions the petitioner provided of the beneficiary's job duties were that the beneficiary would "oversee the second stage of our growth and development, which will involve purchase of rental vehicle, recruitment of personnel, and advertising," and that the beneficiary would be responsible for hiring managerial employees and supervising their performance. However, these two descriptions are too vague and broad to give any meaningful insight into what the beneficiary's duties will be on a daily basis. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.*

The petitioner failed to comply with the director's RFE. The director specifically requested additional evidence to establish that the beneficiary will be employed in an executive or managerial position in the United States, including: bank statements covering the last three months; the petitioner's latest U.S. federal income tax return; photographs of the interior and exterior of the U.S. premises; a list of all the U.S. employees; and an organizational chart/diagram for the U.S. organization. In response to the RFE, the petitioner failed to submit any of the above documents. Instead, the petitioner merely resubmitted copies of previously submitted evidence, which the director already found to be insufficient. 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).

The petitioner failed to establish that it has sufficient physical premises to conduct its business. The petitioner's lease ended on June 30, 2011. The petitioner provided no evidence to establish that it extended its lease or entered into a new lease beyond June 30, 2011. Furthermore, although the petitioner claims that it has acquired property located at [REDACTED] and is currently developing a new facility on these premises, the petitioner failed to establish that it is the owner or legal occupant of the said premises. The documentation reflects that the property was purchased and is currently owned by [REDACTED] not the petitioner. The New York Department of State, Division of Corporations, State Records

& UCC's public website confirms that [REDACTED] is an active, separate legal entity formed in September 2009.¹ The petitioner failed to explain its relationship to [REDACTED]

On appeal, the petitioner asserts that it already submitted "extensive documentation" showing that it invested substantial funds into the U.S. entity by purchasing commercial property and beginning construction on the property, which "confirms financial viability of our company." However, as discussed above, the petitioner failed to establish that the property will be owned or occupied by the petitioner, as the buyer and current owner is [REDACTED]. On appeal, the petitioner also submits for the first time its recent bank account statements, its 2011 federal tax return, and copies of licenses for its vehicles issued between July 2011 and April 2012. However, the AAO will not consider this evidence for any reason. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it for the first time on appeal, without explaining why it could not provide such evidence in response to the RFE. The appeal will be adjudicated based on the record of proceeding before the director.

The record of proceeding before the director contains no evidence to establish that the petitioner is engaged in the regular, systematic, and continuous provision of goods or services. The record contains no evidence to establish that the petitioner has sufficient physical premises to conduct its operations. The petitioner failed to establish what actual job duties the beneficiary will perform on a daily basis in the United States. The petitioner failed to provide any explanation of the organizational structure of the U.S. organization, and what duties will be performed by its U.S. employees. The evidence in the record suggests that the petitioner employs, at the most, two employees, including the beneficiary, although each employee's job duties remain unknown. Overall, the record prohibits a determination that the beneficiary will be employed by the United States entity in a managerial or executive capacity. For this additional reason, the appeal will be dismissed.

C. Qualifying Relationship

The third and final issue to be addressed is whether the petitioner established that it has a qualifying relationship 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 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 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 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.

¹ *See* http://www.dos.ny.gov/corps/bus_entity_search.html (last accessed January 28, 2013).

The petitioner claims it is an affiliate of the beneficiary's foreign employer, [REDACTED] located in Moscow, Russia based upon majority ownership of both entities by the beneficiary. Specifically, the petitioner established that the beneficiary owns 100% of the foreign entity, and owns 50% of the U.S. entity. The petitioner's percentage of ownership in both entities is not in dispute.

Based upon the ownership structure described above, the record reflects that the petitioner does not have a qualifying relationship with the foreign entity based upon common ownership by the beneficiary. The beneficiary does not possess full or even majority ownership of the U.S. petitioner; he owns 50% of the U.S. entity. Furthermore, [REDACTED] owns the other 50% of the U.S. entity. In contrast, the beneficiary owns 100% of the foreign entity. Therefore, the petitioner failed to establish that the U.S. and foreign companies are "owned by the same individual or group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity," as required by 8 C.F.R. § 214.2(l)(1)(ii)(L)(2).

Where common ownership does not exist, the petitioner may still establish a qualifying relationship if it can show that the same individual exercises control over both entities. *Matter of Hughes*, 18 I&N Dec. at 293. Control may be de jure by reason of ownership of 51% of outstanding stocks of the other entity or it may be de facto by reason of control of voting shares through partial ownership and by possession of proxy votes. *Id.*

Here, however, the petitioner failed to establish that the beneficiary controls the U.S. entity, i.e., possess 51% or more of outstanding stocks or control of voting shares through partial ownership and by possession of proxy votes. The only document the petitioner submitted regarding the ownership and control of the U.S. entity was its stock certificate number 2 issued to the beneficiary for 100 shares, representing 50% ownership. The petitioner submitted no documents to establish the control of the U.S. entity.

On appeal, the petitioner notes that USCIS previously recognized the existence of a qualifying relationship between these companies. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition were approved based on the same evidence contained in the current record, the approval would constitute material and 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'r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Based on the foregoing, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. For this additional reason, the appeal will be dismissed.

III. Conclusion

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. 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.