



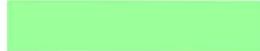
U.S. Citizenship
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Services

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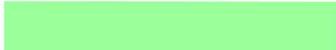


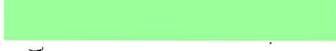
DATE: **JAN 28 2013**

Office: CALIFORNIA 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:

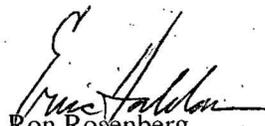


INSTRUCTIONS:

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 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 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 classify 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 Nevada corporation established in September 2000, states that it operates an entertainment business. The petitioner claims to have a qualifying relationship with [REDACTED], located in Australia, as a joint venture. The petitioner seeks to employ the beneficiary in the position of executive director of touring for one year.¹

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with 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, counsel for the petitioner asserts that the director erred in denying the petition, as a qualifying relationship exists between the petitioner and the foreign entity. Counsel submits a brief and 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.

¹ The AAO notes that the beneficiary was previously granted P-1 nonimmigrant status with the same petitioner from July 15, 2011 to July 4, 2012. The petitioner requests that she be granted a change and extension of status.

- (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 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.

II. THE ISSUE ON APPEAL

The sole issue addressed by the director is whether the petitioner established that the beneficiary's foreign employer and the petitioner 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 petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 4, 2010. On the L Classification Supplement to Form I-129, the petitioner identified the beneficiary's last foreign employer as [REDACTED] and stated that the foreign and U.S. companies have a joint venture relationship. Where asked to explain the stock ownership and control of each company, the petitioner stated: "[REDACTED] 100%."

In support of the petition, the petitioner failed to provide evidence of the claimed joint venture relationship. The petitioner provided a copy of its 2010 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates that the company is wholly-owned by [REDACTED]. The petitioner also submitted a letter from [REDACTED], who stated that the petitioner is his company's "United States-based partner."

The director issued a request for evidence ("RFE") on December 15, 2011 instructing the petitioner to submit, *inter alia*, evidence to establish that the U.S. company and the foreign entity have a qualifying relationship as defined in the regulations.

In response to the RFE, the petitioner submitted a copy of a document titled "Agreement" between [REDACTED] (the foreign entity) and [REDACTED] (the petitioning U.S. company). The agreement is dated April 23, 2001 and is signed by the president of each company. The agreement reads, in part:

WHEREAS, [the foreign entity] has knowledge and experience with respect to, and has the personnel, facilities, and equipment necessary to provide, certain management and administrative services to [the petitioner] regarding providing theatrical concepts, themes in the entertainment industry, and related products (the "Business"); and

WHEREAS, Company [the petitioner] is actively engaged in the Business, and desires to retain the [foreign entity] to provide certain management and administrative services to it with respect to the Business; and

NOW, THEREFORE, in consideration of the premises and other mutual covenants and agreements herein contained, the parties hereby mutually covenant and agree as follows:

1. SERVICES

[The foreign entity] shall furnish management and administrative services to [the petitioner] throughout the term of this Agreement. [The foreign entity] shall use its best efforts to furnish such services to the satisfaction of [the petitioner] and shall provide its

services at times and places as are necessary and appropriate to fulfill the duties required, subject at all times to general direction and approval of [the petitioner] or its Board of Directors and Managers.

2. TERM OF AGREEMENT

This Agreement shall become effective on the date first set forth above and shall continue in effect in perpetuity unless terminated by both parties.

3. COMPENSATION

In exchange for providing the management and administrative services to [the petitioner] the foreign entity] shall be paid an equal to Fifty (50% percent of the shows [the foreign entity] provides services for) of the Net shall be payable by [the petitioner] to the [foreign entity] in installments throughout the Term.

The petitioner also submitted seven invoices and proof of payment, dated from January 2011 to August 2011, from the foreign entity billing the U.S. company for services rendered. The description on each of the invoices is "consultancy fee as per consultants agreement." The total amount billed for the seven invoices is \$690,000.

The director denied the petition on April 24, 2012, concluding that the petitioner failed to establish that the petitioner and the foreign entity have an affiliate, joint-venture, or parent-subsiidiary qualifying relationship. In denying the petition, the director found that it had not been shown that the foreign employer and the petitioning entity share common ownership and control. The director further found that the evidence submitted does not demonstrate that the U.S. company is an operating division or office of the foreign entity, as required for a branch relationship, or that there is a parent-subsiidiary relationship.

On appeal, counsel for the petitioner asserts that the foreign entity and the U.S. company have created a joint venture promoted as "[redacted]" Counsel suggests that the contribution of the foreign entity's trademark to the U.S. company creates a joint venture as defined by Endel J. Kolde's writing in *International Business Enterprise* (Englewood Cliffs; Prentice Hall, 1973).

The petitioner submits a joint affidavit by the managers of the foreign entity and the U.S. company explaining their business relationship as follows:

- 1. I, [redacted] started [redacted] Australia (AKA [redacted]) in 1988 and operates as [redacted]

* * *

- 4. [redacted] began its first performances in the USA – 1993.

* * *

6. I, [REDACTED], through the U.S. entity [REDACTED] became his partner and operates as the United States exclusive Booking and Management Agent and Producer of [REDACTED] in 1999.

* * *

9. I, [REDACTED] interview, train and contract with all old and new artist and staff employed in the productions; I further maintain all creative control and integrity standards that have kept [REDACTED] a viable and vibrant production in demand and in production in the United States for the past 14 years:

10. I, [REDACTED] have been in charge of booking the production known as [REDACTED] whenever and wherever performing in the United States; I also negotiate with each venue all the terms relating to the profit sharing of gross revenues generated by the production; Typical venue arrangements vary from Four (4) Wall agreements, where all the risk is on the production to generate revenue, to Two (2) Wall agreements where the venue accepts the risk and the productions get paid a fee plus a minimal share of profits derived from revenue. All financial guarantees to the venue are made by me and the US company [the petitioner].

11. Besides revenue received from ticket sales, Gross revenues also, includes sales of videos, clothing, calendar, memorabilia from the show, etc. These items are created and controlled by [REDACTED] so as to maintain the integrity and quality expected of the [REDACTED] brand.

12. Our Joint collaboration has been successful throughout the past years and continues for the future due to ongoing commitments with the current venue, the [REDACTED] Hotel and Casino. The efforts and obligations of each respective company are integral to the ongoing production's existence. We are clearly operating as a joint collaboration where without the other, the production does not continue as it has over the past fourteen years.

The petitioner also submits the registration from the United States Patent and Trademark Office indicating that "[REDACTED]" is a registered trademark of [REDACTED] (Australia Corporation).

Upon review, counsel's assertions and the presented evidence are not persuasive. The petitioner has not established that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

U.S. Citizenship and Immigration Services (USCIS) accepts the interpretation that a 50-50 joint venture creates a subsidiary relationship for purposes of section 101(a)(15)(L) of the Act. See 8 C.F.R. § 214.2(l)(1)(ii)(K). Neither the Act nor the regulations provide a definition of the term "joint venture." However, the AAO has applied a broad definition of joint venture in prior decisions. *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982) (quoting a definition from Endel J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)). *Matter of Siemens Medical*

Systems, Inc. states: "Where each of two corporations (parents) owns and controls 50 percent of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents." 19 I&N Dec. 362, 364 (BIA 1986). In order to meet the definition of "qualifying organization," a joint venture must be formed as a corporation or other legal entity. 8 C.F.R. § 214.2(l)(1)(ii)(G). A business created by a contract as opposed to one created under corporation law is not be deemed a "legal entity" as used in section 101(a)(15)(L) of the Immigration and Nationality Act. *Matter of Hughes*, 18 I&N Dec. 289, 294 (Comm. 1982); see also *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970).

In this case, there is no evidence of a "third corporation" or other legal entity formed by the petitioner and the beneficiary's foreign employer, and thus no evidence of a valid joint venture relationship for immigration purposes. In addition, the limited purpose of the proposed joint venture, as described in the "agreement" and the affidavit submitted by the petitioner, also raises the question of the foreign entity's intent to enter into anything more than a temporary agreement with the petitioner. The petitioner did not submit any other supporting evidence, such as a joint venture agreement, that would clarify the intent of the two parties.

Further, it is noted that, even if the petitioner and the foreign entity had formed a qualifying 50-50 joint venture prior to the date of filing the petition, the petitioner in this case is not the joint venture itself, but rather one of the partners or shareholders in the claimed joint venture. The partners or shareholders of a 50-50 joint venture do not acquire a qualifying corporate relationship by virtue of forming a joint venture; the qualifying relationship formed exists only between each individual parent and the joint venture entity. Here, there is no indication that the petitioner intended to file the petition on behalf of a separate entity, i.e. the joint venture.

The petitioner has not supported its claim that it has a qualifying relationship with the beneficiary's foreign employer. Accordingly, the appeal will be dismissed.

III. MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the director, the AAO finds that the record is not persuasive in demonstrating that the beneficiary will be employed in the United States in a managerial or executive capacity as defined at section 101(a)(44) of the Act.

On the Form I-129, the petitioner stated that the beneficiary will be employed as the executive director of touring at the U.S. company. Where asked to describe the beneficiary's proposed duties in the United States, the petitioner stated, "male revue show." In support of the petition, the petitioner submitted an employment letter addressed to the beneficiary, describing her proposed duties as follows:

Your duties will include the management of seven (7) employees in the United States and four (4) employees in Australia. You will be responsible for developing and implementing new strategic initiatives in business development; developing show touring schedules; international business development / venue bookings; tour budget forecasting; production budgeting; reconciliation and post-evaluation; retail and merchandise development and operations; and general operational management of [the petitioner's] touring division.

This is a unique position, requiring your knowledge of domestic U.S. markets, international markets and the Australia entertainment industry. Our current business plan call for an additional three (3) staff members to be added to your team within twenty-four months, along with bringing several new shows from Australia and producing them for the U.S. market, and launching new and exciting American productions.

The petitioner submitted an organizational chart for the U.S. company depicting the beneficiary as "executive director of touring and merchandise," directly under the president/CEO. According to the chart, the beneficiary supervises one "touring division booking agent," "one "touring division manager" with three subordinates, one [redacted] retail store manager" with one subordinate, the "[redacted] Show," the [redacted] company manager – Las Vegas" who supervises the cast of the show, and the [redacted] company manager – touring" who supervises the cast of the show.

The petitioner did not submit any details about the beneficiary's position in the United States. Accordingly, the director requested that the petitioner submit a more specific description of the beneficiary's duties, identifying the percentage of time required to perform the duties of the managerial or executive position.

In response to the RFE, the petitioner failed to provide the requested detailed description of the beneficiary's job duties and a breakdown detailing the amount of time the beneficiary allocates to specific duties. In response, the petitioner re-submitted the same organizational chart provided at the time of filing, but failed to respond to the director's request for a more specific description of the beneficiary's duties. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Based on the current record, the AAO is unable to determine that the beneficiary will be primarily a manager or an executive as defined in sections 101(a)(44)(A) and (B) of the Act. The list of duties provided includes several non-qualifying duties, such as "developing show touring schedules," "venue bookings," "and "retail and merchandise development and operations." Although specifically requested by the director, the petitioner's brief and vague description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). This failure of documentation is important because several of the beneficiary's daily tasks, as discussed above, do not fall directly under traditional managerial duties as defined in the statute. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Again, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

While the AAO does not doubt that the beneficiary supervises subordinate personnel, the AAO cannot determine based on the lack of information in the record, the number or types of employees she actually supervises or whether such employees relieve her from performing non-managerial duties. The petitioner stated on the Form I-129 that it had eight (8) employees at the time of filing. The petitioner's organizational chart includes approximately 20 employees (not including cast members of shows and touring groups). The petitioner reported 16 to 17 employees on its state quarterly wage reports during the second and third quarters of 2011. However, AAO cannot overlook the discrepancy between the number of employees reported on the

Form I-129 and the number included in the organizational chart. As such, the petitioner's claim that the beneficiary would be supervising seven employees is called into question.

Further, absent a detailed description of the beneficiary's proposed duties and a breakdown of the amount of time the beneficiary spends on each of the listed job duties, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity at the U.S. company. For this additional reason, the petition cannot be approved.

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

IV. 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.