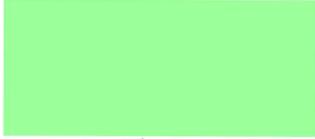




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 19 2013**

OFFICE: VERMONT SERVICE CENTER

FILE:

IN RE: Petitioner:

Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the 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 appeal will be summarily dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Pennsylvania corporation, states that it engages in trading precious stones, gold, and diamonds. The petitioner claims to be a subsidiary of [REDACTED] located in India. The petitioner seeks to extend the beneficiary's L-1A status so that he may continue his employment as its vice president for a period of three years.

On June 11, 2012, the director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity. In denying the petition, the director found that it is evident that all members of the petitioner's staff, including the beneficiary, are performing a substantial number of non-qualifying duties simply because there is no one else to do them, given that the staff consists of a president, a vice president (the beneficiary), and a secretary/bookkeeper. The director further found that the job descriptions provided by the petitioner explicitly attribute marketing, sales and purchasing duties to the petitioner's executive staff, including both the president and the vice president.

On June 25, 2012, counsel for the petitioner submitted the Form I-290B, Notice of Appeal or Motion, to appeal the denial of the underlying petition. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. The petitioner marked box A at part two of the Form I-290B to indicate that a brief and/or additional evidence is attached. The record indicates that neither counsel nor the petitioner submitted a brief with the Form I-290B. The AAO will consider the record complete as presently constituted.

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 the 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.

Regulations at 8 C.F.R. § 103.3(a)(1)(v) state, in pertinent part:

An officer to whom an appeal is taken shall summarily dismiss any appeal when the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

On appeal, counsel for the petitioner simply states:

There are basically two issues based upon which this petition has been denied (1) That the entire executive staff is performing a substantial amount of non qualifying duties. This analysis is in error because based on the documentation submitted, the beneficiary will be spending 15 hours of his 65 hour week to non- qualifying duties and not 15 hours of his 50 hour week. This is a start up corporation and each member including the beneficiary has to spend time towards the success of the business. (2) The second issue was wheather [sic] the petitioner failed to establish that appropriate personell [sic] are available to relieve the beneficiary from non-qualifying duties which can only be cured by additional staff. The contemplation of hiring additional staff has been cured during the pendency of this petition. [REDACTED] has been hired as the sales manager and will be relieving the beneficiary of his non-qualifying functions so that the beneficiary can now devote his entire 65 hours per week to a managerial/executive capacity.

Neither counsel nor the petitioner have specifically identified an erroneous conclusion of law or statement of fact on the part of the director as a basis for the appeal. A simple, blanket assertion that the director's decision was erroneous is not sufficient for an appeal.

The AAO notes that counsel refers to the number of hours worked per week by the beneficiary and indicates that the director erred in stating that the beneficiary spends 15 hours out of a 50 hour work week on non-qualifying duties, when the petitioner intended for the hours to be summed up to a 65 hour work week. The single document in the record that references the beneficiary's hours is unclear and it was reasonable for the director to surmise that the beneficiary has a 50 hour work week.

Further, the AAO acknowledges that the 15 hours per week the beneficiary is claimed to allocate to non-qualifying duties would not constitute the majority of the beneficiary's time in either a 50 hour workweek or a 65 hour workweek. However, as noted by the director the petitioner indicates that it performs a president, a vice president, and a part-time secretary/bookkeeper. The president is claimed to form only marketing and undefined "administrative functions," while the secretary/bookkeeper is responsible for account receivables/payables and maintaining books. All other aspects of operating the company are attributed to the beneficiary, whose duty description states, in part: "Focuses on designing, production, sales and business development. Corporate planning, administration, finance, purchases, sales, business development and personnel." The petitioner further stated that the beneficiary "purchases the goods from India and sells them in the United States." While the petitioner indicates that purchasing and sales tasks require well less than half of the beneficiary's time, this claim is not supported by the record, which indicates that he was in fact the only person charged with these functions.

Additionally, counsel indicates that the petitioner hired a sales manager after the filing of the petition and the only additional evidence presented on appeal is evidence of the new employee. While the AAO acknowledges that the petitioner has hired a new employee, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the

petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978).

Upon review, the AAO concurs with the director's decision and will affirm the denial of the petition. As no erroneous conclusion of law or statement of fact has been specifically identified and as no additional evidence is presented on appeal to overcome the decision of the director, the appeal will be summarily dismissed in accordance with 8 C.F.R. § 103.3(a)(1)(v).

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner stated on the Form I-129 that it is a subsidiary of the foreign entity based on the foreign entity's 100% ownership of the petitioner. The petitioner's articles of incorporation indicate that the petitioner is authorized to issue a total of 1,000 shares. The petitioner submitted one stock certificate dated December 18, 2009, issuing the foreign entity 1,000 shares (100%) of the petitioner stock.

The petitioner submitted a copy of its 2011 IRS Form 1120, U.S. Corporation Income Tax Return. The Form 1120 at Schedule G, which includes questions related to the petitioner's ownership and control, indicates that the beneficiary owns 95% of the company's stock and [REDACTED], the claimed president of the petitioner, owns the remaining 5%.

In this case, the evidence of record fails to demonstrate the actual ownership of the petitioning company and fails to support the petitioner's claim that it is a subsidiary of the foreign entity. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.* at 591-92.

Due to the inconsistencies detailed above, the petitioner has not met its burden to corroborate its claimed qualifying relationship with the foreign entity. 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).

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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, the petitioner has not met that burden.

ORDER: The appeal is summarily dismissed.