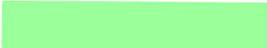


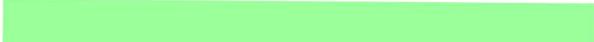


U.S. Citizenship
and Immigration
Services

(b)(6)

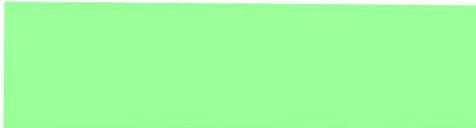


DATE: **AUG 13 2014** OFFICE: CALIFORNIA SERVICE CENTER FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center ("the director"), denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to classify the beneficiary as an 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 California corporation established in 2013, intends to operate a "transportation, warehousing, retail" business. It claims to be an affiliate of the beneficiary's foreign employer, [REDACTED] located in Russia. The petitioner seeks to employ the beneficiary as the president of its new office for a period of one year.

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director erred in evaluating the facts presented and reached an incorrect conclusion regarding the ownership of the foreign entity. The petitioner submits a brief from counsel 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.

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. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer.

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.

* * *

(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.

A. Facts

The petitioner stated on the Form I-129 that it is an affiliate of [REDACTED] the beneficiary's employer in Russia. In a letter in support of the petition, the petitioner indicated that "[b]oth companies are owned and controlled 60% by [the beneficiary]."

The petitioner stated that the beneficiary established the foreign entity in April 2006, and noted that "in late 2012, the Company amended its ownership papers and included [the beneficiary's] son, [REDACTED] as a 40% owner in the foreign Company." The petitioner also identified Mr [REDACTED] as the owner of 40% of its shares.

As evidence of the foreign entity's ownership, the petitioner submitted the following Russian documents with certified English translations:

- Extract from the Unified State Register of Legal Entities for [REDACTED] dated December 29, 2012. This document shows that the foreign entity has authorized capital of 25,000 rubles owned as follows: [REDACTED] – 60 shares valued at 15,000 rubles; [REDACTED] - 40 shares valued at 10,000 rubles.

- Federal Tax Service Certificate of entry into the Unified State Register of Legal Entities, with English translation, indicating that amendments were introduced into the constituent documents of [REDACTED] on December 29, 2012.
- Bylaws Changes for [REDACTED] dated December 20, 2012, which appears to amend the authorized capital of the company to 25,000 rubles

The petitioner also submitted its Articles of Incorporation indicating that it was established as a California corporation with 500,000 authorized shares on April 24, 2013. The petitioner provided a copy of its bylaws which indicate at Article III that the shares are distributed as follows: [REDACTED] – 300,000 shares (60%); [REDACTED] 200,000 shares (40%).

In addition, the petitioner provided a business plan for the new company, in which it reiterated that the beneficiary owns 60% of both companies, while his son, [REDACTED] owns the remaining 40% of each company. At page 6 of the business plan, the petitioner states that the beneficiary was the foreign entity's original owner and that he later brought his son into the business.

The director issued a request for evidence (RFE) on November 27, 2013, in which she instructed the petitioner to provide additional documentation of the ownership and control of the U.S. and foreign entities. With respect to the petitioner, the director acknowledged the submission of its bylaws and articles of incorporation, but advised the petitioner that it did not provide evidence of the owners' stock purchase or capital contributions submitted in exchange for ownership. The director provided a list of relevant evidence the petitioner could submit to satisfy the request, such as stock purchase agreements, stock certificates, a stock ledger, or documents that would establish proof of stock purchase.

With respect to the ownership of the foreign entity, the director advised the petitioner that the submitted evidence did not support the petitioner's claim that both entities are majority owned and controlled by the beneficiary. Specifically, the director observed that the submitted Extract from the Unified Register of Legal Entities for the foreign entity shows that [REDACTED] majority owner. The director therefore requested evidence demonstrating ownership and control of the foreign entity, which could include copies of stock purchase agreements, stock certificates, a stock ledger, proof of stock purchase or other evidence to establish the foreign entity's ownership and control.

In response to the RFE, counsel for the petitioner stated that, due to an oversight, material documentation of the foreign entity's ownership was not included in the petitioner's initial package of evidence. This documentation was provided with the petitioner's response and included:

- Extract from the Unified State Register of Legal Entities for [REDACTED] dated February 7, 2012. This extract shows that the foreign entity has authorized capital of 25,000 rubles owned as follows: [REDACTED] – 40 shares valued at 10,000 rubles; [REDACTED] – 60 shares valued at 15,000 rubles.

- A purchase and sale agreement dated January 25, 2013 in which [REDACTED] agreed to sell a 20% interest in [REDACTED] to the beneficiary in exchange for 5,000 rubles.¹
- A signed statement from [REDACTED] dated November 29, 2013, in which the parties affirm that the [REDACTED] has 60% ownership in [REDACTED] [REDACTED] has 40% ownership.

With respect to the petitioner's ownership, it submitted: a copy of its stock certificates no. 1 indicating that [REDACTED] owns 300,000 shares; a copy of its stock certificate no. 2 indicating that [REDACTED] owns 200,000 shares; a capitalization table indicating that [REDACTED] shares are valued at \$18,000 and \$12,000, respectively; a recent bank statement showing approximately \$29,000 in the petitioner's account; and, a statement from the beneficiary and [REDACTED] dated July 25, 2013 indicating that they were contributing personal assets in the amount of \$18,000 and \$12,000, respectively, for the establishment of the petitioning company.

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. In denying the petition, the director noted that there were unresolved inconsistencies in the record with respect to the ownership of the foreign entity. The director emphasized that the petitioner stated at the time of filing that [REDACTED] become a 40% owner in the foreign company at the end of 2012, while the petitioner's initial evidence showed that Mr. [REDACTED] actually owned a 60% interest in the company at the end of 2012.

The director noted that while the second Extract from the Unified State Register of Legal Entities dated February 7, 2013 indicates that the beneficiary owns 60% of the foreign entity, the submitted sale and purchase agreement between [REDACTED] raised additional inconsistencies. Specifically, the director emphasized that if [REDACTED] actually owned 40% of the foreign entity at the end of 2012, he should own only 20%, rather than 40%, of the foreign entity after the claimed sale of shares to the beneficiary in January 2013. Based on the inconsistencies in the record, the director found insufficient evidence to establish the actual proportion of ownership in the foreign company.

Finally, with respect to the U.S. company, the director found that the petitioner did not provide evidence of the individual cash contributions made by [REDACTED] in exchange for their purchase of stock in the U.S. company. For these reasons, the director found that the evidence did not support a finding that the U.S. and foreign entities are affiliates as defined at 8 C.F.R. § 214.2(l)(1)(ii)(L).

On appeal, counsel suggests that the director failed to give proper weight to the Extract from the Unified State Register of Legal Entities for [REDACTED] dated February 7, 2013 in determining whether the

¹ The director noted in her decision that the signature line of this document identifies the beneficiary, rather than [REDACTED] as the seller. However, the petitioner claims on appeal that this was an error on the part of the translator. Upon review, it is evident that the original Russian-language purchase and sale agreement consistently identifies [REDACTED] as the seller.

petitioner established the claimed 60/40 ownership of the company by [REDACTED]. Specifically, with reference to this evidence, counsel states:

This is THE *GOVERNING DOCUMENT*, because this document is registered with the Russian Authorities (required) and reflects the true ownership as it currently stands in the official's books. That document conforms to the true assertion of the true ownership in the Parent Company and confirms to the controlling package [the beneficiary] has in the Parent Company. All the other presented documents were derivative and subordinate to the one registered with the Russian Authorities.

The petitioner also states that it is submitting additional evidence pertaining to the cash contributions made in exchange for ownership of the U.S. company.

Finally, counsel asserts that the director misunderstood the relationship between the two companies by finding that "the submitted evidence fails to establish that the entity abroad is an affiliate of the US company." Counsel asserts that "the Parent is abroad, the foreign entity; and the newly established US Company is the Affiliate." Counsel contends that the director's "discussion in reference to controlling issue of 60/40 ownership of [REDACTED] was inconsistent with him/her treating the US company as a Parent."

B. Analysis

Upon review the petitioner has not established that it has a qualifying relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Although the petitioner has at times referred to the foreign entity as its "parent," the petitioner has otherwise consistently claimed an affiliate relationship with the foreign entity based on identical ownership and control by the beneficiary (60%) and [REDACTED] (40%). There is no evidence to establish that the foreign entity is the majority owner of the petitioning company such that it would qualify as a parent as defined at 8 C.F.R. § 214.2(l)(i)(ii)(I).

Upon review of the entirety of the evidence submitted, the petitioner has provided sufficient evidence to establish that the beneficiary is the majority owner of the petitioning company. However, the petitioner has not established that the beneficiary currently owns a majority interest in the foreign entity as necessary to establish that the two companies are affiliates.

The petitioner initially indicated that the beneficiary was the foreign entity's founder and owner, and that at the end of 2012, he transferred a 40% ownership interest in the company to his son. The petitioner submitted an Extract from the Unified State Register of Legal Entities dated December 29, 2012, along with a sealed certificate from the Federal Tax Service of Russia indicating that the foreign company filed an amendment to its constituent documents on December 29, 2012. While these documents corroborated the petitioner's statement that there was a change in the foreign entity's ownership at the end of 2012, the company Extract showed that [REDACTED] rather than the beneficiary, owned 60% of the foreign entity. 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).

When asked to clarify the discrepancy in the record with respect to the foreign entity's ownership, the petitioner submitted another Extract from the Unified State Register of Legal Entities dated February 7, 2013 which indicated that the beneficiary owned 60% of the foreign entity as of that date. Counsel stated that the exclusion of this document from the petitioner's initial evidence was an oversight, but did not claim that the Extract dated December 29, 2012 contained incorrect information. Given that the petitioner expressly stated that the beneficiary transferred a 40% ownership in the company to his son at the end of 2012, the information in the Extract dated December 29, 2012 remains at odds with the petitioner's claims.

Further, as noted by the director, the information provided in the purchase and sale agreement dated January 25, 2013 is also inconsistent with the petitioner's initial claim that the beneficiary transferred a 40% ownership interest in the foreign entity to [REDACTED] at the end of 2012. If Mr. [REDACTED] did in fact own 40% of the foreign entity as of January 25, 2013 when he purportedly sold a 20% interest in the company to the beneficiary, the resulting ownership interest reported on the Extract dated February 7, 2013 should have been 20%, not 40%.

On appeal, counsel relies on the Extract from the Unified State Register of Legal Entities dated February 7, 2013 as the definitive document establishing the foreign entity's ownership "because this document is registered with the Russian Authorities (required) and reflects the true ownership as it currently stands in the official's books." Counsel also states that all other documents submitted to USCIS for review were "derivative and subordinate to the one registered with the Russian Authorities." However, the only document in the record which was clearly registered with the Russian authorities was the December 29, 2012 Extract from the United State Register of Legal Entities which was accompanied by a sealed certificate from the Federal Tax Service of Russia, and which acknowledged that the petitioner filed an amendment to its state-registered constituent documents on that date. The petitioner has not provided any comparable evidence pertaining to the claimed change of ownership that occurred in February 2013 in support of counsel's assertion that this document was registered with the Russian authorities.

Further, counsel's suggestion that the evidence submitted at the time of filing is "derivative or subordinate" to the extract submitted in response to the RFE is not supported. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Moreover, the petitioner has not explained why it repeatedly stated at the time of filing that a 40% ownership was transferred to [REDACTED] at the end of 2012 if there was a subsequent material change in ownership in 2013. Based on the foregoing discussion, there are unresolved discrepancies in the record with regard to the foreign entity's actual ownership. The petitioner was given an opportunity to submit additional objective evidence of the foreign entity's ownership in the form of stock certificates, stock ledgers, and other relevant documentation, but chose to rely on the February 2013 Extract document and the sale and purchase agreement. Again, 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. at 591-92.

While the evidence suggests that both companies are owned by the same two individuals, father and son, the petitioner has not established that the companies are owned and controlled by the same individual or by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity. Accordingly, the petitioner has not established that the two entities qualify as affiliates as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(L). The appeal will be dismissed.

III. Managerial or Executive Capacity

Beyond the decision of the director, the petitioner did not establish that it would employ the beneficiary in a qualifying managerial or executive capacity within one year of approval of the petition, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C).

The petitioner initially submitted a vague description of the beneficiary's proposed duties which failed to establish what he would do on a day-to-day basis as president of the petitioner's "transportation-warehousing-retail" business within one year. The petitioner indicated that he would "direct the business activities and establish budgets," "plan, organize, direct and control business activities," establish and implement goals, hire staff and establish their job duties and salaries, and hold authority to change locations and borrow money and incur indebtedness on behalf of the corporation. 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. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

In a letter submitted in response to the RFE, the beneficiary submitted a significantly different proposed position description and stated that his duties would include meeting with business partners, familiarizing himself with local regulatory requirements pertaining to taxes and licensing, researching logistics, investigating shipping methods, reviewing trucking companies, establishing credit opportunities, and researching and retaining accounting services. The petitioner's business plan indicates the company's intent to hire one employee, a salesperson, to assist the beneficiary during the first year of operations, and indicates that it will pay \$200 per month to an accountant. The petitioner did not explain how a single subordinate employee would relieve the beneficiary from performing non-qualifying duties associated with the operation of the petitioner's business. The petitioner has not demonstrated that the beneficiary, as a personnel manager, will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel. *See* section 101(a)(44)(A)(ii) of the Act. Furthermore, the petitioner has not established that it will employ a staff that will relieve the beneficiary from performing non-qualifying duties so that the beneficiary may primarily engage in managerial duties. Further, regardless of the beneficiary's position title, the record is not persuasive that the beneficiary will function at a senior level within an organizational hierarchy or focus primarily on executive-level duties as defined at section 101(a)(44)(B) of the Act.

Moreover, while the petitioner primarily focuses on its plans to purchase American-made goods for export to Russia, the petitioner indicated on the Form I-129 and on its IRS Form SS-4 that it intends to engage in transportation services, warehousing, and retail sale of clothing. This inconsistency raises questions regarding the petitioner's actual physical premises requirements and staffing needs for the first year of operations and further supports a finding that a single sales employee will not relieve the beneficiary from performing non-managerial duties during the first year of operations. 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 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.