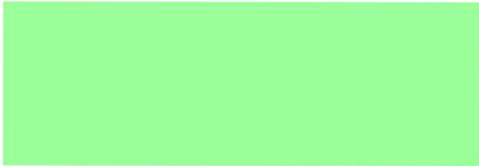




U.S. Citizenship
and Immigration
Services

(b)(6)



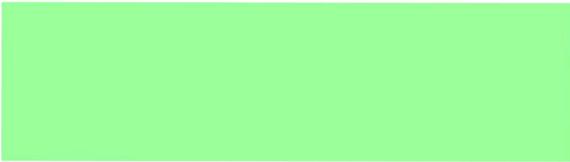
DATE: DEC 02 2014

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 California Service Center Director denied this nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this Form I-129, Petition for a Nonimmigrant Worker, seeking to employ the beneficiary as an L-1B 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 is a Montana corporation, established in January [REDACTED] engaged in the sale and service of lasers. The petitioner claims to be a subsidiary of [REDACTED] the beneficiary's foreign employer, located in Lithuania. The petitioner seeks to transfer the beneficiary to the United States to serve in a specialized knowledge capacity, as a senior service engineer, for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the United States petitioner and the foreign entity have a qualifying relationship.

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. The petitioner states that if it did not meet its burden of establishing the qualifying relationship in its original filing or RFE response, it has met its burden with the submission of additional documents on appeal. The petitioner submits a brief and additional documents.

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 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 has established that the United States petitioner and the foreign entity 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 on October 22, 2013. The petitioner identified the beneficiary's foreign employer as [REDACTED]. The petitioner stated that it has a parent/subsidiary relationship with [REDACTED] the foreign entity, through a holding company called [REDACTED]. The petitioner stated that [REDACTED] was incorporated in 2005 and is a 60/40 partnership of [REDACTED]. The petitioner further stated that [REDACTED] owns 90% of the petitioner's shares while the petitioner's president, [REDACTED] owns the remaining 10%. The petitioner stated that [REDACTED] has no employees and engages in no activity other than its ownership of the petitioner.

To demonstrate [REDACTED] ownership, the petitioner provided a letter from [REDACTED] chief executive, asserting that [REDACTED] owns 90% of the petitioner and that [REDACTED] itself is 60% owned by [REDACTED] and 40% owned by [REDACTED].

The petitioner submitted two of its own shares certificates. Share certificate number 1 certifies 900 shares issued to [REDACTED] and share certificate number 2 certifies 100 hundred shares to [REDACTED]. Both certificates are undated and signed by [REDACTED] as President and Secretary.

In a letter, the petitioner asserted that "[i]f [the petitioner] is unable to obtain Beneficiary's services, it will continue to contract with [REDACTED] for technical services and support." The petitioner submitted its organizational chart depicting the beneficiary's proposed function as senior service engineer as "currently contracted to [REDACTED]."

The director issued a Request for Evidence (RFE), instructing the petitioner to provide additional evidence such as all stock certificates, stock registries or ledgers, and meeting minutes to establish that the petitioner and the foreign entity have a qualifying relationship.

In response to the RFE, the petitioner submitted the following documents: 1) Articles of Incorporation for [REDACTED] filed on December 9, 2005 with the [REDACTED] reflecting that the company is authorized to issue 50,000 shares of stock with no par value and that the company elects to operate without a Board of Directors; 2) Share certificates number 3 and 4 issuing 450 shares to [REDACTED] and 50 shares to [REDACTED] respectively; 3) Share register listing petitioner's issuance of 900 shares on January 12, 2006 and 450 shares on August 20, 2006 to [REDACTED], and issuance of 100 shares on January 20, 2006 and 50 shares on August 20, 2006 to [REDACTED]; 4) Petitioner's bank account activity records; and 6) Letter from [REDACTED] Chief operations Manager & Acting Chief Executive asserting that the petitioner is the company's "US office."

The petitioner submitted Minutes of the petitioner's shareholders meeting held on February 3, 2013 listing [REDACTED] as the holder of 1800 shares and [REDACTED] as the holder of 200 shares. The document indicated that [REDACTED] would act as Chairperson and Secretary for the meeting and the minutes were signed only by [REDACTED] as Secretary and President. A signature block for "[REDACTED] Executive Director" was left blank.

The petitioner submitted its IRS Form 1120 U.S. Corporation Tax Return for 2011 indicating that [REDACTED] holds 90% of its voting stock and [REDACTED] holds 10%. The petitioner provided its Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business attached to both the 2011 and 2012 returns list [REDACTED] LTD as indirect 25% foreign shareholders. The petitioner attached an explanatory statement to its Form 5472 stating [REDACTED] each own 50% of the petitioner's direct shareholder, [REDACTED].

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. The director found that the petitioner had not established that [REDACTED] was 60% owned by the foreign entity and 40% owned by [REDACTED].

On appeal, the petitioner asserts that the petitioner and the foreign entity have an indirect relationship. The petitioner reasserts that the foreign entity owns 60% of holding company, [REDACTED] owns 90% of the petitioner, establishing the qualifying relationship. The petitioner acknowledges that it claimed on its 2011 and 2012 tax returns that the holding company [REDACTED] was owned equally (50/50) by the foreign entity and [REDACTED]. The petitioner amended its tax returns for 2011 and 2012 and submitted a letter from its accountant, dated February 26, 2014, stating that the returns had "incorrect ownership percentages." The petitioner asserts that consideration of these amendments along with other available evidence demonstrates that it has met its burden in demonstrating a qualifying relationship.

In support of this appeal, the petitioner submits an extract from [REDACTED] dated February 24, 2014 indicating that the company was established in 1995, operates as a metal manufacturer, and has a president, [REDACTED] and an executive director, [REDACTED]. For the first time on appeal, the petitioner submits a translation of a document listing the shareholders of [REDACTED] and states that if it did not meet its burden initially or in response to the RFE, it now submits evidence necessary to gain approval of this petition. The petitioner submits a number of documents and a brief on appeal.

Upon review, the petitioner has not established 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. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In this matter, the petitioner provided insufficient evidence to establish that the foreign entity owned a 60% majority interest in the holding company, [REDACTED]. The petitioner initially provided a letter signed by [REDACTED] director, asserting that the foreign entity held a majority ownership. However, the petitioner provided no evidence establishing Mr. [REDACTED] director. Moreover, despite the director's RFE request, the petitioner provided no [REDACTED] stock certificates, stock registry, bylaws, or minutes of shareholder meetings to demonstrate ownership of [REDACTED]. 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 concedes that its 2011 and 2012 tax returns indicated that [REDACTED] was equally owned by the foreign entity and [REDACTED] rather than the 60/40 split initially claimed. No voting agreement was provided. On appeal, petitioner asserts that the tax return claims were made in error. Petitioner submitted amended tax returns and an accountant's letter. Nevertheless, the petitioner provided no reason for the "clerical" error. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that the claim on the tax returns was an error does not qualify as independent and objective evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998). Furthermore, evidence that the petitioner creates after USCIS points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event to be proven and existent at the time of the director's notice.

On appeal, the petitioner submitted a single translated document indicating that the foreign entity owns 60% of [REDACTED] shares.

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).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

We note that the petitioner's organizational chart indicated that the beneficiary's proposed function was currently contracted to the foreign entity and the petitioner lamented that if the petition were not approved the petitioner would have to continue to contract with the foreign entity for technical services and support. This suggests that the beneficiary's foreign employer may have only had a contractual relationship with the petitioner. 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).

Some of the petitioner's documentation contains unresolved inconsistencies such as the petitioner's share certificate registry documenting issuance of 1500 shares whereas the meeting minutes depict 2000 issued shares. The record contains incomplete, unsigned and undated documentation relating to the petitioning company. 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). Finally, counsel for the petitioner asserts that the petitioner "met its burden in showing a qualifying relationship of ownership in terms of voting shares and control in the person of [REDACTED] who has executive positions with all three companies" however, the record does not support this conclusion. 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 Obaigbena*, 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). Accordingly, the appeal will be dismissed.

III. CONCLUSION

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.