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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **MAY 27 2014** Office: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 is an Illinois corporation engaged in the development and sale of digital dictation software. The the petitioner indicates that it has a qualifying relationship with [REDACTED] Ltd., the beneficiary's United Kingdom employer. The petitioner seeks to employ the beneficiary in the capacity of North American regional manager for a period of three years.

The director denied the petition, concluding that the petitioner did not establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. Further, the director concluded that the petitioner had not demonstrated 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, the petitioner submits additional evidence and requests that this office reconsider the director's decision to deny the petition.

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, Petition for a Nonimmigrant Worker, 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.

II. The Issues on Appeal

A. Managerial and Executive Capacity Abroad

The first issue addressed by the director is whether the petitioner has established that the beneficiary has been employed abroad in a managerial or executive capacity.

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.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

1. Facts

The petitioner states that it is a wholly owned subsidiary of [REDACTED] Ltd, a company based in New Zealand. The petitioner explained that [REDACTED] is a "world leading provider of [REDACTED] software" and that it has locations in twenty-five countries. The petitioner indicated on the Form I-129 that it earned over \$2 million in 2011 and that it has thirteen employees. The petitioner further stated that the beneficiary has been employed with its claimed affiliate located in the United Kingdom since November 2007 and described his current position as follows:

[The beneficiary] is currently employed as UK Legal & Professional Manager. He is responsible for all accounts in these sectors ensuring a good relationship is maintained between the customer and the company. He is also responsible for the sales targets in these sectors ensuring they are achieved and maintaining working with his colleagues in all areas of the business.

The petitioner's initial evidence included no additional information regarding the beneficiary's overseas employment. Accordingly, the director later issued a request for evidence (RFE) advising the petitioner that the initial evidence was insufficient to establish that the foreign entity employs the beneficiary in a qualifying managerial or executive capacity. Specifically, the director requested that the petitioner submit: (1) copies of the beneficiary's training, pay or other personnel records; (2) an organizational chart for the foreign entity including the names of all members of the beneficiary's immediate department, their job titles, a summary of their duties, education levels and salaries; (3) a letter from an authorized representative of the foreign entity describing the managerial or executive decisions made by the beneficiary, his typical duties, and the percentage of time he devotes to each duty.

In response, the petitioner submitted an employment contract dated November 1, 2011 between the beneficiary and the foreign entity whereby the foreign entity contracted to employ the beneficiary as legal and professional manager. Appendix A of the agreement listed the beneficiary's duties as follows:

- Develops a business plan and sales strategy for the region that ensures attainment of company sales goals and profitability.
- Responsible for the performance and development of the Account Executives.
- Prepares action plans by individuals as well as by team for effective search of sales leads and prospects.
- Initiates and coordinates development of action plans to penetrate new markets as agreed in the annual plan.
- Assists in the development and implementation of marketing plans as needed.
- Conducts one-on-one review with all Account Executives to build more effective communications, to understand training and development needs, and to provide insight for the improvement of Account Executive's sales and activity performance.
- Provide weekly pipeline reporting for each member of the sales team.
- Achieve accurate sales forecasting on line with agreed targets.
- Provides timely feedback to senior management regarding performance.
- Provides timely, accurate, competitive pricing on all completed prospect applications submitted for pricing and approval, while striving to maintain maximum profit margin.
- Achieves own personal sales target.
- Maintains accurate records of all pricings, sales, and activity reports submitted by Account Executives.
- Creates and conducts proposal presentations and RFP responses.
- Assists Account Executives in preparation of proposals and presentations.
- Controls expenses to meet budget guidelines.
- Ensures that all Account Executives meet or exceed all activity standards for prospecting calls, appointments, presentations, proposals, forecasting and closes.
- Maintains contact with all clients in the market area to ensure high levels of client satisfaction.

In denying the petition, the director stated that the beneficiary's duty description includes both managerial and non-managerial tasks and emphasized that the petitioner failed to clarify the amount of time devoted to specific duties, such that it could be concluded that he performs primarily managerial duties. The director also pointed to the petitioner's failure to submit the requested organizational chart for the foreign entity as necessary to support its claim that the beneficiary is employed in a qualifying managerial or executive capacity.

On appeal, the petitioner submits additional evidence with respect to the beneficiary's foreign employment and requests that this office reconsider the director's denial. This evidence includes an organizational chart for the foreign entity, an expanded duty description for the beneficiary which assigns percentages to his various duties, position descriptions for the beneficiary's claimed subordinates within the foreign entity, and evidence of their educational credentials and salaries.

The petitioner also submits new evidence in an effort to document the nature of the beneficiary's duties abroad. For instance, the petitioner submitted a "legal & professional sales strategy" document drafted by the beneficiary, a listing of client accounts overseen by the beneficiary, and a request for proposal response drafted by the beneficiary.

2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary has been employed in a qualifying managerial or executive capacity abroad.

As a preliminary matter, we note that the director, prior to denying the petition, issued an RFE and requested that the petitioner submit a duty description indicating the amount of time the beneficiary devotes to his managerial or executive duties and an organizational chart for the foreign entity including the names of all members of the beneficiary's immediate department, their job titles, a summary of their duties, education levels and salaries. The petitioner did not submit this evidence in response to the director's request and now provides this evidence on appeal.

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. Consequently, this office will not consider the duty description submitted for the beneficiary on appeal or the newly submitted evidence regarding the beneficiary's subordinates and the foreign entity's staffing levels and organizational structure.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

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. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. As observed by the director, the petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but failed to quantify the time the beneficiary

spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as providing weekly pipeline reporting for each member of the sales team; achieving accurate sales forecasting; achieving his personal sales targets; providing timely, accurate, competitive pricing on all completed prospect applications; maintaining accurate records of all pricing, sales and activity reports; creating request for proposal responses; and maintaining contact with all clients in the market area, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Furthermore, new evidence submitted on appeal confirms that the beneficiary has been performing non-qualifying duties consistent with the provision of goods and services. For example, the petitioner provides a response to a request for proposal drafted by the beneficiary demonstrating that the beneficiary is directly engaged in the performance of operational duties. Further, the petitioner submitted listings of the beneficiary's client accounts, suggesting that the beneficiary is more closely engaged with monitoring sales and service and assuring that customer needs are met, rather than establishing and implementing broader goals and policies. In total, the evidence is insufficient to establish that the beneficiary performs primarily managerial or executive duties.

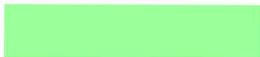
Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding the beneficiary's actual duties and role in a business. Here, the petitioner failed to provide the information requested regarding the foreign entity's organizational structure and the beneficiary's subordinates. Without this material information, the director reasonably concluded that the totality of the evidence in the record was insufficient to establish that the beneficiary has been employed in a qualifying managerial or executive capacity abroad. As discussed above, this office need not and does not consider the sufficiency of previously requested evidence submitted on the first time on appeal.

As such, our determination is based primarily on the job descriptions submitted at the time of filing and in response to the RFE, which are insufficient to establish that the beneficiary is employed abroad in a qualifying managerial or executive capacity. Accordingly, the appeal must be dismissed.

B. Qualifying Relationship

The next issue addressed by the director is whether the petitioner established that it has a qualifying relationship with the 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 (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

1. Facts

On the Form I-129, the petitioner stated that the beneficiary's United Kingdom employer is [redacted] Ltd. and indicated that it is a subsidiary of this company. The petitioner did not provide evidence of the ownership of [redacted]. The petitioner's initial evidence included a stock certificate indicating that it has issued 100 shares to [redacted] Ltd. The petitioner also

submitted its Illinois articles of incorporation which indicate that the company was authorized to issue 10,000 common shares and proposed to issue 100 shares at the time of incorporation in February 2003.

The director issued an RFE requesting that the petitioner provide additional evidence to document the ownership of both companies. The director stated that such evidence could include the following with respect to each entity, where relevant: (1) the most recent Security and Exchange Commission Form 10-K; (2) the most recent annual report; (3) a detailed list of owners, their names and their percentages of ownership; (4) meeting minutes; (5) articles of incorporation; (6) stock purchase agreements; (7) stock certificates, (8) a stock ledger; (9) proof of stock purchases, and/or (10) income tax returns.

In response, the petitioner provided a chart identifying eight companies comprising its corporate group. The chart indicated that [REDACTED] Ltd., a holding company, owns 100% of [REDACTED] Ltd, both located in New Zealand. Further, the chart indicates that [REDACTED] is 75.1% owned by [REDACTED] Ltd. and that the petitioner is 100% owned by [REDACTED] Ltd. Additionally, the petitioner submitted a 2013 compiled financial statement for [REDACTED] stating that [REDACTED] also owns 100% of [REDACTED] Ltd. and [the petitioner]."

The petitioner also provided documentation of its ownership including a "Memorandum of Action by Sole Shareholder" and a "Memorandum of Action of Directors" both dated March 31, 2003. The aforementioned corporate documents indicate that "[REDACTED]" of [REDACTED] New Zealand owns 100 shares in the petitioner through the payment of £100 consideration. Further, the petitioner's 2012 IRS Form 1120 U.S Corporation Income Tax Return states in Schedule G that 100% of its stock is owned by [REDACTED] of New Zealand.

As noted, the director denied the petition, finding that the petitioner had not established that it had a qualifying relationship with the foreign entity.

On appeal, the petitioner submits additional evidence meant to demonstrate that it has a qualifying relationship with the beneficiary's foreign employer. The petitioner submits a share certificate No. 2 dated August 2, 2003 stating that [REDACTED] owns 50 shares in the foreign entity at a fully paid share price of £1.00 per share. The petitioner also alternatively submits a certificate No. 3 dated August 1, 2006 that also indicates that [REDACTED] owns fifty shares in the foreign entity. Further, the petitioner re-submits the corporate entity chart previously submitted on the record which reflects that [REDACTED] is 75.1% owned by [REDACTED] Ltd.

2. Analysis

Upon review, and for the reasons discussed herein, the petitioner has not established that it has a qualifying relationship with the foreign entity.

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.

In the RFE the director requested that the petitioner submit evidence to demonstrate ownership in the foreign entity, including but not limited to the following: (1) the most recent Security and Exchange Commission Form 10-K; (2) a recent annual report; (3) a detailed list of owners, their names and their percentages of ownership; (4) meeting minutes; (5) articles of incorporation; (6) stock purchase agreements; (7) stock certificates, (8) a stock ledger; (9) proof of stock purchases, or (10) income tax returns. However, the petitioner submitted none of this documentation relevant to the foreign entity.

Again, 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 of ownership in the foreign entity that has been submitted on appeal.

Regardless, the petitioner has submitted conflicting statements of ownership in the foreign entity thereby leaving question as to its actual ownership. For instance, the petitioner has submitted two share certificates (No. 2 and 3), dated approximately three years apart, which both state that the [REDACTED] owns 50 shares in the foreign entity. But, the petitioner has also alternatively stated in the provided corporate entity chart that the foreign entity is only 75.1% owned by [REDACTED] Ltd. Furthermore, 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.* However, as noted, the petitioner failed to submit the aforementioned evidence after being directly requested to do so by the director and it has not provided this additional evidence on appeal. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

Therefore, without a clear statement and consistent supporting evidence regarding the ownership of the foreign entity, it cannot be determined whether a qualifying relationship exists. As such, the petitioner has not established that it has a qualifying relationship with the foreign entity. For this additional reason, the appeal must be dismissed.

III. Conclusion

The appeal will be dismissed for the above stated reasons. 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.