



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-E-G-, CO.

DATE: NOV. 4, 2015

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, an import, export, and retail motorcycle dealer, seeks to extend the Beneficiary's status as an L-1A nonimmigrant intracompany transferee. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The Director, Vermont Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the Petitioner had not established a qualifying relationship with the Beneficiary's foreign employer. On appeal, the Petitioner asserts that the Director's basis for denial of the petition was erroneous and contends that it has satisfied all evidentiary requirements.

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)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

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.

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 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:

(b)(6)

Matter of D-E-G-, Co.

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;

....

- (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.

A. Facts

The Petitioner filed the Form I-129 on October 21, 2013. The Petitioner checked the box on the Form I-129 Supplement L, indicating that it is the parent company of the Beneficiary's foreign employer located in Brazil. Where asked to explain the company stock ownership and managerial control of each company, the Petitioner stated "[t]he Brazilian Company owns 51% of the USA Company."

The Petitioner submitted a copy of its Florida Articles of Incorporation filed on [REDACTED]. The Articles of Incorporation indicate that the Petitioner is authorized to issue 1,000 shares of common stock valued at \$1.00. The Petitioner did not submit documentary evidence showing that any shares were issued or provide any other evidence related to its ownership. The Petitioner also submitted a translated copy of the Beneficiary's foreign employer's Articles of Incorporation. The Articles of Incorporation identified the "social capital" of the foreign entity as divided into 20,000 shares with \$1.00 par value among four partners. The four partners are identified as the Beneficiary holding 9000 shares, [REDACTED] holding 9,000 shares, [REDACTED] holding 1,000 shares, and [REDACTED] holding 1,000 shares.

(b)(6)

Matter of D-E-G-, Co.

In response to the Director's initial request for further evidence (RFE) on this issue, the Petitioner submitted a document titled "Articles of Amendment to the Articles of Incorporation" dated [REDACTED]. The date of each amendment adopted is stated as [REDACTED] and the effective date of each amendment is stated as [REDACTED]. On page two of this four-page document, section D, the abbreviated name of the foreign entity is added and identified as the president and director of the Petitioner. On page three of this four-page document, at section F, the document includes the following language:

[REDACTED], [the Beneficiary], have the 51% of the Corporate Shares.
[REDACTED] have the 25% of the Corporate Shares.
[REDACTED] Have the 24% of the Corporate Shares.

In a response to the Director's second RFE on this issue, the Petitioner asserted that it has shown by a preponderance of the evidence that the "Brazilian Parent Company (. . .) owns 51% of the U.S. Subsidiary [the Petitioner]." The Petitioner submitted the same "Articles of Amendment to the Articles of Incorporation" previously submitted with the addition of a notary's signature and seal dated [REDACTED]. The Petitioner also included a printout from the website of the Florida Department of State Division of Corporations listing the president of the Petitioner as [REDACTED].

The Director denied the petition, determining that the evidence of record showed that effective [REDACTED] the foreign entity owned 51% of the Petitioner's shares. The Director determined, however, that the Petitioner had not submitted evidence to establish that it had a qualifying relationship with the foreign entity when the petition was filed on October 21, 2013.

On appeal, the Petitioner asserts that it is affiliated with the Beneficiary's foreign employer. The Petitioner provides copies of the previously submitted corporate documentation.

B. Analysis

Upon review, we concur with the Director's determination that the Petitioner did not establish that it has a qualifying relationship with a foreign entity when the petition was filed.

The regulation and case law confirm that ownership and control are the factors that must be examined when 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. 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.

(b)(6)

Matter of D-E-G-, Co.

Here, the record includes insufficient probative evidence establishing the actual ownership and control of the Petitioner when the petition was filed. 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). The record does not include the Petitioner's corporate stock certificate ledger, stock certificate registry, corporate bylaws, or the minutes of relevant shareholder meetings. Thus, it is not possible to ascertain the total number of shares issued, the exact number issued to each shareholder, and the subsequent percentage held by each shareholder. Moreover, 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.*, 19 I&N Dec. 1632. Without full disclosure of all relevant documents, U.S. Citizenship and Immigration Services (USCIS) is unable to determine the elements of ownership and control.

We have reviewed the Petitioner's Amendment to its Articles of Incorporation with an effective date of [REDACTED]. As the Director noted, this amendment was made subsequent to the filing of this petition and cannot establish the Petitioner's eligibility at the time of filing. The record remains devoid of any evidence showing the ownership of the company at the time of filing. Further, the Petitioner did not submit any probative documentary evidence disclosing any agreements related to the transfer of shares to the foreign entity. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Petitioner claims on appeal that it is "affiliated with" the foreign entity, but it is not clear whether the Petitioner is claiming to be an affiliate as that term is defined at 8 C.F.R. § 214.2(l)(1)(ii)(L). However, if the Petitioner is making this claim, the record does not support a finding that the Petitioner and the foreign entity are both owned and controlled by the same parent or individual, or that the Petitioner and the foreign entity are both owned and controlled by the same group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity.

Upon review of the totality of the record, the Petitioner has not established that it has a qualifying relationship with the Beneficiary's foreign employer. Accordingly, the appeal will be dismissed.

III. U.S. EMPLOYMENT IN A MANAGERIAL OR EXECUTIVE CAPACITY

Beyond the decision of the Director, the Petitioner has not established that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition.

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.

B. Facts

In the initial letter in support of the petition, the Petitioner provided a lengthy but broad overview of the Beneficiary's duties. The Petitioner also submitted a copy of its business plan indicating that in its second year of operations it projected spending \$120,000 in salaries. The Petitioner submitted a document printed on October 7, 2013, showing the amount paid to five individuals including the Beneficiary for the year to date. The beginning and ending dates for the payment is not indicated on the document. The Petitioner did not identify its current number of employees on the Form I-129.

In response to the Director's RFE, the Petitioner stated that the Beneficiary "will spend 100% of his time solely performing executive duties." The Petitioner stated that the Beneficiary would spend 35

percent of his time delegating management tasks and team building, 20 percent setting and updating strategies, policies, and goals, 15 percent on capital allocation, and discretionary financial decisions, and the remaining 30 percent overseeing assessments and forecasts and financial reports and reconciling activity and financial flow and reporting to the foreign entity. The Petitioner identified its employees as a president, the Beneficiary in the position of general manager, a sales manager, and an office manager. The Petitioner noted that the sales and office manager reported to the Beneficiary. The record included payroll details for three employees (the Beneficiary, the president and the office manager) during the first quarter of 2014, and four employees (the Beneficiary, the president, the office manager, and the sales manager) in the first two months of the second quarter of 2014. The record does not include any documentary evidence of the Petitioner's number of employees during the quarter in which the petition was filed, the fourth quarter of 2013.

In response to the Director's second RFE, the Petitioner provided a third iteration of the Beneficiary's duties. The Petitioner stated that the Beneficiary oversees the management of the company, defines customer needs and develops strategies, negotiates with major customers and suppliers, develops new customer and vendor relationships, coordinates the company's financial activities, responds to the needs of the marketplace and communicates plans to the management team, develops the motorcycle and parts market, promotes the company, oversees personnel decisions, delegates and oversees the coordinator and other management team members, and reviews activity reports, sales statistics, etc. The Petitioner also noted that it planned to hire additional employees within the next 12 months.

B. Analysis

On review, the record as presently constituted is not persuasive in demonstrating that the Beneficiary will be employed in a qualifying managerial or executive capacity under the extended petition. The Petitioner indicates that it plans to hire additional managers and employees in the future. However, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In this matter, the Petitioner has not reached the point that it can employ the Beneficiary in a predominantly managerial or executive position.

We note that the Petitioner did not provide a consistent and detailed description of the Beneficiary's actual duties. First, the Petitioner provides a broad overview of the duties the Beneficiary performs for the Petitioner. However, reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the Beneficiary's daily job duties. The Petitioner has not provided sufficient probative detail or explanation of the Beneficiary's activities in the course of his daily routine. The actual duties themselves will reveal the true nature of the employment. *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).

Additionally, the Petitioner indicates that the Beneficiary will delegate and oversee management team members and the management of the company, but the record does not include evidence of the Petitioner's employees when the petition was filed. Even if considering the Petitioner's employees in the first quarter of 2014 (the quarter following the date the petition was filed), the Petitioner employed only the Beneficiary, the president of the company and an office manager. The Petitioner does not state what duties the president of the company performs, if any and the Petitioner does not indicate that the Beneficiary supervises or otherwise manages this position.

Moreover, the record is insufficient to establish that either the president or the office manager relieves the Beneficiary from performing the operational and administrative tasks necessary to conduct the Petitioner's business operations. The Petitioner operates a 2,400 square foot motorcycle parts and accessory retail store located in a shopping plaza and also provided evidence that it exports the same type of products to customers located primarily in Brazil. The job descriptions provided for the Beneficiary and his subordinate(s) do not clearly describe the nature of their duties within the context of this business and are therefore limited in probative value.

For example, the Petitioner states that its employees work Monday through Friday during regular, 9 to 5 business hours. However, the Petitioner's commercial lease states that its store is required to be open seven days per week during regular retail hours. Therefore, while the petitioner has not stated that it employs anyone to act as a sales person, stockperson, purchaser, logistics staff or cashier, a company engaged in retail and export sales reasonably requires someone to perform these duties, many of them seven days per week. We note that many of the submitted invoices dated in September and October 2013 list the Beneficiary's name as "salesperson" and "cashier," thus confirming that he is involved in the day-to-day operations of the business.

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. However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In the present matter, the regulations require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). As noted, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter,

the Petitioner has not reached the point that it can employ the Beneficiary in a qualifying managerial or executive capacity. For this additional reason, the petition cannot be approved.

We may deny an application or petition that fails to comply with the technical requirements of the law 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, 1037 (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

When we deny a petition on multiple alternative grounds, a Petitioner can succeed on a challenge only if it shows that we abused our discretion with respect to all of our enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1037 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.

Cite as *Matter of D-E-G-, Co.*, ID# 14523 (AAO Nov. 4, 2015)