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FILE: SRC 06 116 52678 Office: TEXAS SERVICE CENTER Date: APR 04 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager 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, a Florida corporation, states that it is engaged in the distribution, installation, and maintenance of refrigeration and kitchen equipment. The petitioner claims to be a subsidiary of Empanadas Vallunas, located in Colombia. The beneficiary was initially granted a one-year period in L-1A classification to open a new office in the United States, and the petitioner now seeks to extend his status for three additional years.

The director denied the petition on June 15, 2006, concluding that the petitioner (1) did not establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity; or (2) that the petitioner has a qualifying relationship with the beneficiary's foreign employer.

The petitioner subsequently filed an appeal on July 18, 2006. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On the Form I-290B Notice of Appeal to the AAO, counsel for the petitioner asserts:

The decision is violative of the leading cases involving similar issues. A brief shall be provided within 30 days.

As no additional evidence has been incorporated into the record, the AAO contacted counsel by facsimile on March 5, 2007 to request that counsel acknowledge whether the brief and/or evidence were subsequently submitted, and, if applicable, to afford counsel an opportunity to re-submit the documents within five business days. As of this date, the AAO has not received a response. Accordingly, the record of proceeding is considered complete.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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

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

Upon review, the AAO concurs with the director's decision and affirms the denial of the petition. Counsel's general objections to the denial of the petition, without specifically identifying any specific errors on the part

of the director, are simply insufficient to overcome the well-founded and logical conclusions the director reached based on the evidence submitted by the petitioner. The 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).

While counsel alleges that the director's decision violates "leading cases involving similar issues," counsel has not identified the "leading cases" to which he refers. The record shows that at the end of the first year of the petitioner's operations in the United States, the beneficiary was the sole employee. Although the petitioner claims that it utilizes the services of two independent contractors who serve as sales manager and marketing manager, the petitioner did not provide documentary evidence to establish that these contractors actually worked for the petitioner as of the date of filing. Moreover, the petitioner did not claim to employ any employees or contractors to provide the company's "engineering services," which appear to be the company's primary source of income according to the petitioner's sales invoices. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, it is appropriate for CIS 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. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id*

Furthermore, in the present matter the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). 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 CIS 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 predominantly managerial or executive position. The director reasonably concluded, based on the evidence presented, that the beneficiary would be required to primarily perform the routine operational tasks of the petitioning company, and would be prohibited from performing primarily managerial or executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The brief statement submitted by counsel on appeal also fails to address the director's finding that the petitioner failed to submit documentary evidence to resolve the ownership of the U.S. company, and thus did not establish the existence of a qualifying relationship with the foreign entity. The petitioner claims to be a wholly-owned subsidiary of Empanada Vallunas, a Colombian sole proprietorship owned by [REDACTED]. The petitioner submitted its stock certificate number one showing that all of the petitioner's stock was issued to Empanadas Vallunas on May 26, 2004. However, the petitioner also submitted its 2004 IRS Form 1120, U.S. Income Tax Return for an S Corporation, which indicates that the company has two shareholders. The petitioner submitted a Schedule K-1 identifying the beneficiary as a 50 percent shareholder; however, the record contains only a partial copy of the other Schedule K, and the identity of the second shareholder cannot be confirmed. Regardless, this evidence does not corroborate the petitioner's claim that it is wholly owned by the foreign entity.

Furthermore, to qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. *See Internal Revenue Code, § 1361(b)(1999)*. A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity. This conflicting information has not been resolved. 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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Inasmuch as the petitioner has failed to identify specifically an erroneous conclusion of law or a statement of fact in support of the appeal, the petitioner has not sustained that burden.

**ORDER:** The appeal is summarily dismissed.