



U.S. Citizenship  
and Immigration  
Services

D7.



File: EAC 08 192 50805    Office: VERMONT SERVICE CENTER    Date: DEC 04 2009

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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Jerry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 dismissed.

The petitioner filed this nonimmigrant petition seeking to employ 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, a Florida corporation, claims to be a subsidiary of [REDACTED] located in Brazil. The petitioner seeks to employ the beneficiary as the administrative and general manager of its new office in the United States for a two-year period.<sup>1</sup>

The director denied the petition concluding that the petitioner failed to establish: (1) that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity or that the U.S. entity will support a managerial or executive position within one year; or (2) that the U.S. company has a qualifying relationship with the foreign entity.

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. On appeal, the petitioner asserts that the director's decision contains at least one misstatement of fact and concedes that its response to the director's request for evidence was not presented "in a good manner." The petitioner submits a letter and additional documentary evidence in support of appeal.

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

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<sup>1</sup> Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

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) also 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 involves 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.

The first issue to be addressed is whether the petitioner established that it will employ the beneficiary in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

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.

The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. When a new business is first 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 low level 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 that first year. In an accommodation that is more lenient than the strict language of the statute, the "new office" regulations allow a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position.

Accordingly, if a petitioner indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is prepared to commence doing business immediately upon approval so that it will support a manager or executive within the one-year timeframe. This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to house the new office and that it will support the beneficiary in a managerial or executive position within one year of approval. Specifically, the petitioner must describe the nature of its business, its proposed organizational structure and financial goals, and submit evidence to show that it has the financial ability to remunerate the beneficiary and commence doing business in the United States. *Id.*

The petitioner filed the nonimmigrant petition on June 25, 2008. The petitioner submitted evidence that the U.S. company was incorporated in October 2007, and provided a copy of its lease agreement for commercial office space. In a letter submitted in support of the petition, the petitioner described the beneficiary's proposed duties as follows:

[The beneficiary] will be responsible for the general management of [the petitioner]. She will coordinate the set up of the office, hiring subdivision managers and supporting clerical staff.

She will exercise wide latitude in discretionary decision-making over the day-to-day operations and activities of the Company. She will receive general supervision of the partners/owners of [the foreign entity], the parent company.

The petitioner did not describe the proposed nature of the office, the scope of the entity, its organizational structure, and its financial goals, nor did it provide evidence of the size of the United States investment, as required by 8 C.F.R. § 214.2(l)(3)(v)(C).

The director issued a request for additional evidence (RFE) on August 15, 2008, in which the director requested, *inter alia*, the following: (1) evidence showing the management and personnel structure of the U.S. entity, including an organizational chart and complete position descriptions for the United States employees; (2) information regarding the number of subordinate supervisors to be managed by the beneficiary; (3) information regarding the amount of time the beneficiary will allocate to executive/managerial duties; and (4) additional information to demonstrate that the beneficiary would not be performing the non-managerial, day-to-day operations involved in producing a product or providing a service.<sup>2</sup>

In response to the RFE, the petitioner submitted a letter which was identical in content to the letter submitted at the time of filing. The petitioner submitted copies of pay stubs and IRS Forms 941, Employer's Quarterly Federal Tax Return, demonstrating that it has been paying one employee since June 2008. The petitioner did not provide the employee's job title or provide the requested organizational chart depicting current and proposed employees. The petitioner's response to the RFE did not otherwise address the above-referenced requests.

The director denied the petition on December 15, 2008, concluding that the petitioner did not establish that beneficiary would be employed in a primarily managerial or executive capacity, or that the U.S. company would support an executive or managerial position within one year of commencing operations. The director acknowledged the brief position description submitted, but noted that the petitioner had not identified any other current or proposed employees who would performing the day-to-day non-managerial operations of the company.

On appeal, the petitioner asserts that the beneficiary will "coordinate the set up of the office, hiring subdivision managers and supporting clerical staff," and "will exercise wide latitude in discretionary decision-making over the day-to-day operations and activities of the company." The petitioner states that the petitioner has sufficient funds to cover its initial expenses and that the foreign entity will provide financial support until the U.S. company is capable of generating revenues. The petitioner indicates that it hired a "clerk person" in July 2008 and states that "the goal of the corporation is set up a health insurance network aimed mostly the Brazilian community."

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<sup>2</sup> The AAO notes that the initial petition was filed without a completed L Classification Supplement to Form I-129, on which the petitioner is required to indicate whether the beneficiary is coming to the United States to open a new office. The petitioner indicated on Form I-129 that it has 11 employees and gross annual income in excess of \$627,857. The petitioner has since clarified that this information pertained to the foreign entity; however, these factors appeared to have impacted the director's assessment of the initial evidence, as the director believed that the petitioner was presenting itself as a fully-staffed and operational company.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year.

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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's proposed organizational structure, the duties of the beneficiary's proposed subordinate employees, the petitioner's timeline for hiring additional staff, the presence of other employees to relieve the beneficiary from performing operational duties at the end of the first year of operations, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. As discussed above, the petitioner's evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. *See generally*, 8 C.F.R. § 214.2(l)(3)(v).

In the instant matter, the petitioner's description of the beneficiary's proposed duties is too vague and non-specific to establish that she will be employed in a primarily managerial or executive capacity within one year. For example, the petitioner indicates that the beneficiary "will be responsible for the general management" of the company, "exercise wide latitude in discretionary decision-making over the day-to-day operations and activities," and "receive only general supervision of the partners/owners." These statements merely paraphrase the statutory definition of executive capacity and provide little insight into the nature of the beneficiary's proposed duties. 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.).

The totality of the record must be considered in analyzing whether the proposed duties are plausible considering the petitioner's anticipated staffing levels and stage of development within a one-year period. With respect to the petitioner's staffing levels, the petitioner failed to provide a proposed organizational chart for the company and simply stated that the beneficiary will hire "subdivision managers" and clerical staff. Any 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 has provided no business, financial or hiring plan to demonstrate its anticipated growth during the first year of operations. Absent information regarding the number and types of workers to be hired and evidence of the company's ability to support the hiring of such subordinate staff, the AAO cannot conclude that the beneficiary would be relieved from performing primarily non-managerial duties within one year.

Although the director noted the lack of evidence with respect to the company's proposed staffing and organizational structure in the notice of denial, the petitioner has not addressed the petitioner's proposed staffing levels on appeal other than providing the job title and evidence of wages paid to the one employee already hired. This minimal evidence does not in fact establish a reasonable expectation that the business will rapidly expand to the point where it requires a manager or executive to primarily perform the high-level duties contemplated by the statutory definitions. The petitioner has provided no information regarding the intended U.S. operation other than indicating on appeal that it intends to "set up a health insurance network." The

record remains devoid of any evidence that would indicate how the petitioner intends to accomplish this goal and support a managerial or executive position within one year.

A related issue not addressed by the director is whether the petitioner provided sufficient evidence of the size of the financial investment in the new United States office, as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(2). The evidence submitted on appeal shows that the petitioner had \$472 in its checking account as of June 30, 2008. The record contains evidence of one wire transfer in the amount of \$10,000 which was deposited to the petitioner's account in October 2008. The petitioner has not provided a business or financial plan or otherwise outlined its anticipated capital requirements and start-up costs, and it is thus impossible to evaluate whether the petitioner has sufficient funds to commence business operations.

Therefore, the AAO's review of this issue is severely restricted by the petitioner's failure to submit evidence or information regarding the beneficiary's proposed duties, the proposed nature of the office, the anticipated scope of the entity, and its financial goals, as required by 8 C.F.R. § 214.2(l)(3)(v)(2). While a business plan is not explicitly required by the regulations, the petitioner has provided no explanation regarding the intended scope of the organization or its financial goals, no timeline for hiring additional employees, insufficient evidence of the size of the investment required for start-up operations, and no financial objectives or projections for the company's first year of business. 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)). The AAO cannot speculate as to when or how many employees might be hired or otherwise determine how many employees the company would support at the end of the first year of operations, or who would be performing the day-to-day, non-managerial functions of the business.

The AAO does not doubt that the beneficiary will have supervisory authority over the petitioner's business. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Overall, the vague job description provided for the beneficiary, the lack of detail regarding the petitioner's business plan and hiring plan for the first year of operations, considered with the lack of evidence of the size of the U.S. investment, prohibits a determination that the petitioner will support a managerial or executive position within one year. For this reason, the appeal will be dismissed.

The second issue to be addressed is whether the petitioner established that the U.S. company and the foreign entity have a qualifying relationship. 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 at 8 C.F.R. § 214.2(l)(1)(ii) states, in pertinent part:

- (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 (1)(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.

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(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.

The petitioner indicated in its initial letter that the U.S. company is wholly-owned by the foreign entity, [REDACTED]. The petitioner submitted the U.S. company's articles of incorporation, but did not provide evidence to demonstrate the ownership of the company.

Accordingly, in the RFE issued on August 15, 2008, the director requested documentary evidence of the ownership and control of the companies, including copies of stock certificates, stock ledgers, articles of incorporation or other documentation. As noted above, the director also instructed the petitioner to complete and submit the L Classification Supplement to Form I-129, which was not included in the initial filing.

In response, the petitioner submitted a letter in which it reiterated that the U.S. company is wholly-owned by the Brazilian entity. The petitioner stated on Form I-129 that the U.S. entity is the parent company of the foreign entity. Where asked to describe the stock ownership and managerial control of each company, the petitioner indicated: "[REDACTED] – 80%; [REDACTED] – 20%." The petitioner did not submit copies of its stock certificates or any documentary evidence of the ownership of the company.

The petitioner's response to the RFE included a copy of its 2007 IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner indicated at Form 1120, Schedule K that no foreign person or entity owns at least 25% of the U.S. company's stock.

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign entity. The director acknowledged the petitioner's claim that it is a subsidiary of the foreign entity, but observed that "no legal documentation was submitted to demonstrate that connection."

On appeal, the petitioner asserts that the foreign entity owns 80 percent of the petitioner's stock. In support of this assertion, the petitioner submits a copy of the petitioner's stock certificate number one, which indicates that the foreign entity was issued 800 of the company's 1,000 authorized shares on October 30, 2007. The petitioner also submits a copy of stock certificate number two, which indicates that 200 shares of the petitioner's stock were issued to the petitioner on October 30, 2007. The petitioner also re-submits a copy of its IRS Form 1120 for 2007.

Upon review, the petitioner has not submitted sufficient evidence to establish the claimed parent-subsidiary relationship.

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. 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.

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). The record before the director contained no documentary evidence of the U.S. company's ownership, despite the director's specific request for such evidence. Therefore, the petition was properly denied.

If the petitioner had wanted its stock certificates 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, the appeal will be dismissed.

Furthermore, as noted above, the record contains an unresolved discrepancy, given the petitioner's response on its Form 1120 that it has no foreign majority owner. 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. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

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. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.