

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
Room 3008, AAO, 20th Floor, 3/F
425 I Street, N.W.
Washington, D.C. 20536



FEB 12 2004

FILE: SRC 02 094 51371 Office: TEXAS SERVICE CENTER Date:

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner claims to be a consultant firm and attorney referral service. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager. The director determined that: (1) the petitioner had failed to establish that a qualifying relationship exists between the U.S. and foreign entities; and (2) the beneficiary has been and would be employed in the United States primarily in a qualifying managerial or executive capacity.

On appeal, the petitioner asserts that the evidence submitted establishes that there is a qualifying relationship between the U.S. and foreign entities, and that the beneficiary is employed by the U.S. entity primarily in a managerial or executive capacity.

The regulations at 8 C.F.R. § 214.2(1)(3) state 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 (1)(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.

* * *

The regulations at 8 C.F.R. § 214.2(1)(14)(ii) state that a visa petition under section 101(a)(15)(L) 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 (1)(1)(ii)(G) of this section;

- (B) Evidence that the United States entity has been doing business as defined in paragraph (1) (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.

According to the documentary evidence contained in the record, the petitioner was established in 2000 and claims to be a consultant firm and an attorney referral service. The petitioner claims that it is an affiliate of Margarita Trade Point C.A., located in Venezuela. The petitioner seeks to continue the beneficiary's services as general manager for a period of three years, at a weekly salary of \$990.80. The petitioner declares two employees and \$96,037 in gross annual income.

The first issue in this proceeding is whether a qualifying relationship exists between the U.S. and foreign entities.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(G) state:

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; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

In pertinent part, the regulations define "parent," "branch," "subsidiary," and "affiliate" as:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

* * *

Branch means an operation division or office of the same organization housed in a different location.

* * *

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.

* * *

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.

8 C.F.R. §§ 214.2(1)(1)(ii)(I), (J), (K), and (L).

In the instant matter, the petitioner claims to be an affiliate of the foreign entity. The petitioner submitted as evidence a

U.S. Partner's Share of Income, Credits, and Deductions, etc, Schedule K, Form 1065 for the year ending 2001 and a Florida Partnership Information Return ending December 31, 2001, Part II of the form, Distribution of Partnership Income Adjustment that indicates the following stock distribution:

<u>NAMES</u>	<u>Before Change</u>	<u>End of Year</u>
[REDACTED]	40%	50%
[REDACTED]	40%	50%

The petitioner described the stock ownership of the foreign entity, Margarita Trade Point C.A. on the Form I-129 as follows:

<u>NAMES</u>	<u># OF SHARES</u>	<u>% OF OWNERSHIP</u>
[REDACTED]	400	40%
[REDACTED]	400	40%
[REDACTED]	100	10%
[REDACTED]	100	10%

The petitioner submitted a translated version of Minutes of Annual Meeting of Shareholders of the foreign entity held on January 10, 2002, in which the stock distribution is the same as is indicated in the I-129 petition. The petitioner also submitted a letter from the foreign entity, dated May 20, 2002, in which the beneficiary is said to own 40 percent of the foreign entity's shares.

The director denied the petition after determining that the evidence submitted did not establish that a qualifying relationship exists between the U.S. and foreign entities. The director stated that the evidence presented showed that neither the beneficiary nor his U.S. partner owned a majority of the foreign company. The director further stated that the foreign company did not own the U.S. entity and that, therefore, the companies were not affiliates nor was the U.S. entity a subsidiary of the foreign company.

On appeal, the petitioner asserts that the director's decision was incorrect, and that since 2002 [REDACTED] and [REDACTED] acquired the remaining 20 percent of shares of stock in the U.S. and foreign entity, from the other family

partners (Herminia Mochen 10 percent owner and Soledad Pettineroli 10 percent owner); therefore, qualifying the U.S. entity as an affiliate. The petitioner also states that the change for the foreign corporation will not be reflected until after January 2003, due to registration restrictions. The petitioner concludes by stating that the two former minority shareholders are no longer partners due to a family decision. The petitioner submits no further documentary evidence to substantiate his claim.

The petitioner's assertions are not persuasive. As the above percentages demonstrate, the petitioner's ownership structure does not comply with 8 C.F.R. § 214.2(l)(1)(ii)(K) or 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). The record as presented does not reflect that a qualifying affiliate relationship exists between the U.S. entity and the foreign company as the record does not show that both entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. In addition, the petitioner has failed to resolve the inconsistencies contained in the record with regard to stock ownership of the foreign entity. Evidence produced by the petitioner demonstrates that 40 percent of the foreign entity shares of stock are owned by the beneficiary, another 40 percent of the stock is owned by Dimas J. Pettineroli, 10 percent of the foreign company's stock is owned by Soledad Pettineroli, and 10 percent is owned by Herminia Mochen. In opposition to this evidence, the petitioner claims that the foreign company stock has been redistributed and that the beneficiary and [REDACTED] each now own 50 percent of the foreign entity's stock. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19I&N Dec. 582, 591-92 (BIA 1988). Here, the petitioner has not presented any credible documentary evidence to show that the foreign entity's shares of stock have been redistributed. To the contrary, the petition in this matter, a copy of the shareholder meeting minutes, dated January 10, 2002, and a letter from the foreign entity, dated May 20, 2002, all indicate no change in the distribution of the foreign entity's stock distribution.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U.S. and foreign entities for purposes of a nonimmigrant visa petition. *Matter of Siemens*

Medical Systems, Inc., 19 I&N Dec. 362 (Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant visa proceedings). 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, supra*. In the instant matter, there has been no evidence submitted to establish control of one entity over the management of another. The petitioner has not submitted any proof of stock purchase, stock certificates, stock certificate registry, stock ledgers, purchase of shares agreements, or any other business documents to substantiate his contention. The record does not establish that the control of the entity is *de jure* or *de facto*, or to what extent proxy votes are utilized. *Matter of Hughes*, 18 I&N Dec. 289 (BIA 1982). In addition, the petitioner has failed to submit sufficient evidence to overcome the issues raised by the director.

In a nonimmigrant petition for an intracompany transferee, general evidence of stock ownership alone is not sufficient to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificates, 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 of ownership and its affect on corporate control. Although the petitioner claims that the beneficiary owns 50 percent of both the U.S. and foreign entities and controls the entire operation, there has been no concrete documentary evidence submitted to assure the validity of his contention. Additionally, a petitioning company must disclose all agreements relating to the redistribution of shares, 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, supra*. In the instant matter, the petitioner has also failed to provide sufficient documentary evidence to show proof of stock purchase or notice of corporate transaction. Without full disclosure of all relevant documents, the Citizenship and Immigration Services (CIS) is unable to determine the elements of ownership and control.

Upon review, the petitioner has not established that an affiliate relationship exists between the foreign and U.S. entities. Neither has the evidence established a parent-subsubsidiary relationship between the foreign and U.S. entities, in that the evidence submitted does not establish ownership by the parent company of the U.S. entity. There is insufficient detail regarding a qualifying relationship to overcome the objections made by the director.

The second issue in this proceeding is whether the petitioner has established that the beneficiary has been and will continue to be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

In the petition, the petitioner describes the beneficiary's past job duties as: "elaborate the policies and practices of the company, resources administration, planning and travel. Coordinate and direct support services." The petitioner also describes the beneficiary's proposed job duties as: "planning, managing and supervising the operations in the affiliate."

In response to the director's request for additional evidence the petitioner states the beneficiary's role within the U.S. entity is as follows:

[The beneficiary's] duties in the US are very wide and are not limited only to management functions as accounting or directing the daily business operations.

[The beneficiary] is in charge also of the set up of our client's corporations, acting as an initial manager and liaison with their new environment, contacting them with contact persons within private sector and government offices, helping them to solve all their initial needs as entrepreneurs in the U.S.

[The beneficiary] is also the decision maker and designs the company policy.

[The beneficiary's] duties in the U.S. includes[sic]:

- 1) In charge of coordination of Company operations in U.S., Venezuela and Argentina as a Director of the management.
- 2) Supervise and controls the work of other managerial employees.
- 3) Has the authority to hire and fire or recommend or refer those as well as other personnel actions.
- 4) In charge of research of solutions for technical matters for foreign clients.
- 5) Liaison with the attorney's included in the list of the Attorney Referral Service.
- 6) Provider of technical and management advise for the new entrepreneurs.
- 7) Liaison with government, banking, chambers of commerce and service providers for our clients.
- 8) Liaison with the Florida Bar.
- 9) In charge of research of new business opportunities for our clients.
- 10) In charge of selection and hiring of new employees and service providers.
- 11) Provides technical assistance to new managerial team members.

The petitioner also provided a list of six independent contractors who it claims are employed by the U.S. entity. The petitioner provided Income Tax Forms 1099 for only two of the described independent contractors. Although requested to do so, the petitioner elected not to provide the Service with 1098 income tax forms.

The petitioner submitted a company business plan for the U.S. entity, which depicts the beneficiary's position description as follows:

[The beneficiary] is the Vice President of the company. He brings several years of experience in the legal field to the business. He holds a law degree with specialization in Human Rights. He is a practicing licensed attorney in Argentina and Brazil. He is also involved in planning, developing and establishing policies and objectives for the business. He develops and maintains the vision of the company by

overseeing marketing, product development, promoting sales, production and customer service. He ensures that the firm's customers are satisfied. He assesses the profitability of market segments and develops the company's goals.

The director determined that the petitioner had not submitted sufficient evidence to show that the beneficiary has been or will be employed primarily in a managerial or executive capacity.

On appeal, the petitioner disagrees with the director's findings. The petitioner states that the beneficiary is the general manager for the U.S. entity. The petitioner goes on to state that the beneficiary's duties include "contacting clients, determining which businesses to pursue, signing new contracts, hiring attorneys, accounting, bank and financial services, and meeting with other parties to create new business." The petitioner also contends that the beneficiary is not a "mere agent." The petitioner submits no new documentary evidence to substantiate its position.

On review of the complete record, it cannot be found that the beneficiary has been and will continue to be employed in a primarily managerial or executive capacity. The information provided by the petitioner describes the beneficiary's current duties only in broad and general terms. There is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as being responsible for coordinating company operations, supervising and controlling the work of others, researching solutions for technical matters, and liaising with attorneys, government, and the Florida Bar are without any context in which to reach a determination as to whether they would be qualifying as managerial or executive in nature.

Further, the vague position descriptions, including "planning, developing and establishing policies and objectives," are insufficient to establish that the beneficiary's current job duties are managerial or executive in nature. The petitioner has not provided persuasive evidence to establish that the beneficiary has been managing the organization, or managing a department, subdivision, function, or component of the company, at a senior level of the organization hierarchy. The petitioner agrees with the director's decision with regard to the nature of the beneficiary's duties, in that it admits in the record that the beneficiary's job duties "are very wide and are not limited only

to management functions as accounting or directing the daily business operations."

The record does not support a finding that the petitioner will be supervising a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties. Although requested by the director, the petitioner failed to submit Income Tax Forms 1098 to substantiate its claim of employing six independent contractors. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner did submit copies of two Income Tax Forms 1099, which demonstrate that two of the six independent contractors received nonemployee compensation for a period during 2001. This evidence is insufficient to show that the independent contractors were employed on a full-time basis or that they received any form of managerial or supervisory instruction from the beneficiary. There is also a lack of evidence to establish to what extent the independent contractors' time was spent relieving the beneficiary from performing the non-qualifying duties of the organization. The evidence shows that the two independent contractors were contracted to perform limited tasks, financial consultants and record filing services and, therefore, the tasks do not qualify as performing a major function of the U.S. entity or providing a major service that allowed the entity to achieve its goals.

The petitioner's evidence is not sufficient to establish that the beneficiary has been directing the management of the organization or a major component or function of the organization; establishing the goals and policies of the organization; exercising wide latitude in discretionary decision-making; and receiving only general supervision or direction from higher-level executives. The petitioner states that the beneficiary has worked setting up client's corporations, acting as an initial manager and liaison with their new environment, contacting clients with contact persons within the private and government sectors, and helping them to solve their initial needs as entrepreneurs in the U.S. A description of the beneficiary's other job duties, submitted by the petitioner, mirror the regulatory and statutory definitions of manager or executive. The beneficiary's position title cannot be used to substitute for a concrete description of the beneficiary's actual duties. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title.

Based upon the evidence furnished, it cannot be found that the beneficiary has been employed in a primarily managerial or executive capacity.

Furthermore, the record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed managerial or executive staff position. The petitioner asserts on appeal that the business anticipates bringing on new employees and expanding the U.S. partnership in the near future. However, 8 C.F.R. § 214.2(1)(3)(v)(C) allows the intended United States operation (new office) 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 is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant case, the beneficiary, at best, will be supervising non-professional employees, and will continue to provide the day-to-day services of the U.S. entity. The evidence fails to demonstrate that the petitioner has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Beyond the decision of the director, evidence submitted by the petitioner is insufficient to establish that the foreign entity has and will continue doing business by providing a regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. § 214.2(1)(1)(ii)(H). As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.