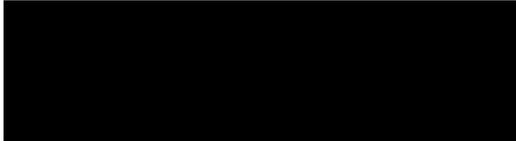


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



FILE: WAC 01 117 50233 Office: CALIFORNIA SERVICE CENTER

Date: APR 17 2003

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:



PUBLIC COPY

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 the Bureau of Citizenship and Immigration Services (Bureau) 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 Director, California Service Center denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner, [REDACTED] Inc., states that it is an affiliate of [REDACTED], a Philippine corporation. The Philippine corporation provides general contracting services. The petitioner plans to engage in land preparation, drainage, and construction. The U.S. entity was incorporated in the State of California on February 21, 2001. The petitioner now seeks to hire the beneficiary as a new employee. The U.S. entity, therefore, is petitioning the Bureau to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for one year. The petitioner seeks to employ the beneficiary as the U.S. entity's general manager at an annual salary of \$36,000. The director denied the beneficiary's nonimmigrant petition because the petitioner is neither an affiliate nor a subsidiary of the Philippine company. On appeal, the petitioner contends that the U.S. entity is an affiliate of the Philippine company. In turn, the petitioner argues that, because of the alleged affiliate relationship, the Bureau should classify the beneficiary as a nonimmigrant intracompany transferee.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

Under 8 C.F.R. § 214.2(1)(3), 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.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization with 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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(l)(3)(v), 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 involved executive or managerial authority of 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 paragraph (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.

On appeal, counsel claims the petitioner is an affiliate of the Philippine company. The pertinent regulations at 8 C.F.R. § 214.2(1)(1)(ii) define a "qualifying organization" and related terms as:

(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; and

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

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operation 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.

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 United States and foreign entities for purposes of this nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 595 (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*.

The petitioner submitted Form I-129 on February 23, 2001. The submission included only one item pertinent to the qualifying relationship question, namely, the Articles of Incorporation which the petitioner filed with the State of California on February 21, 2001. The articles authorized the company to issue 50,000 shares of stock. In turn, on March 27, 2001, the director issued a request for evidence (RFE). In regard to the qualifying relationship issue, the director, in part, requested:

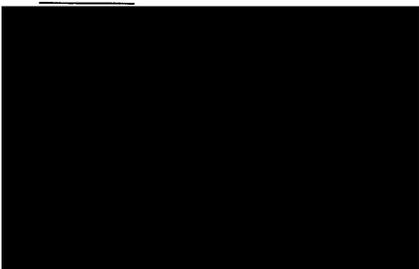
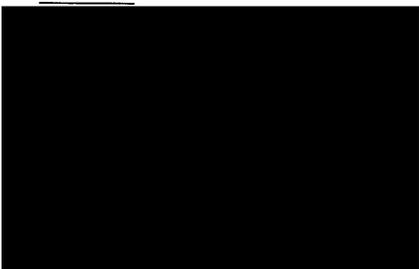
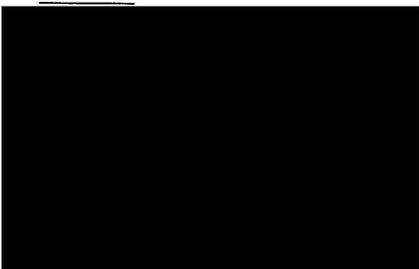
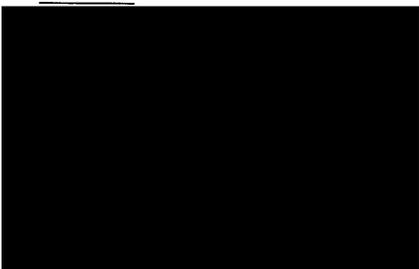
- LIST OF OWNERS: Provide a detailed list of all owners of the foreign company and what percentages they own. List names, corporate and specific

government affiliation, and percentages of ownership.

- STOCK CERTIFICATES: Submit copies of all of the U.S. company's stock certificates issued to the present date clearly indicating the name of each shareholder.
- STOCK LEDGER: Submit copies [of] the U.S. company's stock ledger showing all stock certificates issued to the present date including total shares of stock sold, names of shareholders, and purchase prices. (Emphasis in original.)
- NOTICE of TRANSACTION PURSUANT to CORPORATIONS: Submit a copy of the U.S. company's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts. If not already provided, please show that the parent company has, in fact, paid for the stock ownership. The evidence should include wire transfers, bank statements, cancelled checks, etc., and must clearly document that the parent company has paid for the stock ownership.

In response to the RFE, petitioner's counsel submitted documents relevant to the Philippine entity:

- An October 6, 2000 filing with the Philippine Securities and Exchange Commission, indicating that the foreign entity had issued 70,000 shares of stock.
- A stock distribution list:

| <u>Owner</u> | <u>Shares</u> |
|---|---------------|
|  | 67,000 |
|  | 300 |
|  | 1,500 |
|  | 300 |
|  | 300 |
|  | 300 |
|  | 300 |
| | <u>70,000</u> |

Additionally, in response to the request for evidence, petitioner's counsel submitted documents relevant to the U.S. operation:

- A June 8, 2001 application on Form SS-4 for an Employer Identification Number (EIN) with the Internal Revenue Service.
- A June 18, 2001 business master account agreement with Washington Mutual Bank for account number 0383-0000148719-0.
- Earlier Washington Mutual Bank statements for the monthly periods ending February 13, 2001 and March 13, 2001 for what appeared to be Diosdado S. Collado's personal account, identified as number 383-050246-0.
- A March 19, 2001 business license.
- A fictitious business name statement filed with Monterey County, California on March 14, 2001.
- A State of California Employment Development Department (EDD) Registration Form for Commercial Employers, Form DE-1, filed June 5, 2001.
- A five-year, commercial lease signed on April 22, 2001 for 1229 Judson Street, Seaside, California for an unspecified number of square feet.

Although the petitioner supplied many of the requested documents, the petitioner failed to submit certain requested items. Specifically, the petitioner did not supply:

- Copies of all of the U.S. company's stock certificates issued to the date of the RFE, clearly indicating the name of each shareholder;
- Copies of the U.S. company's stock ledger showing all stock certificates issued to the date of the RFE including total shares of stock sold, names of shareholders, and purchase prices; and

- A copy of the U.S. company's Notice of Transaction Pursuant to Corporations Code Section 25102(f) showing the total offering amounts, including evidence which demonstrates that the parent company paid for the U.S. stock ownership.

"Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition." 8 C.F.R. § 103.2(b)(14). The evidence that the petitioner failed to submit was material because it could have established the U.S. entity as an affiliate, subsidiary, or branch of the overseas entity. Therefore, given the petitioner's failure to submit material evidence, the director properly denied the petition.

The evidence that the petitioner submitted pursuant to the RFE raises a further issue. In particular, the petitioner filed Form I-129 on February 23, 2001. However, the evidence above demonstrates that by February 23, 2001, the petitioner had not yet requested an EIN, opened a business bank account, applied for a business license, filed a registration form with the California EDD, or signed a commercial office lease. As noted previously, the petitioner accomplished these tasks between March 14, 2001 and June 18, 2001. The Bureau may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The only task which apparently occurred on or before February 23, 2001, was [REDACTED] opening of a personal bank account. Opening a personal bank account does not, however, establish a qualifying organization. In sum, the petitioner established new facts after the original filing date of February 23, 2001 that are critical to the petitioner's eligibility; the petitioner was not eligible at the time of filing. Therefore, the Bureau cannot approve the petition.

On appeal, petitioner submitted additional evidence not provided in response to the RFE. The evidence included:

- A stock distribution list for the U.S. entity:

| <u>Owner</u> | <u>Shares</u> |
|--------------|---------------|
| | 59,500 |
| | 3,500 |
| | 3,500 |
| | 3,500 |
| | <u>70,000</u> |

- Minutes from the first meeting of the U.S. entity's board of directors signed on June 5, 2001.¹ The minutes state that the corporation issued 70,000 shares of stock pursuant to Section 25102(h) of the Corporations Code of California.
- By-Laws signed June 13, 2001.
- A stock ledger, transfer ledger, and embossed certificates for stock issued to [redacted] [redacted] and [redacted] in the amounts above. The ledger and certificates represent that the petitioner issued all the stock on June 5, 2001.
- The April 22, 2001, lease with an added statement under the signatures that reads, "NOTE: Lease Agreement covers the total land area of 3,000sq/ft [sic]."
- An office floor plan appended to the revised lease.
- Additional Washington Mutual business banking statements for the periods ending June 30, 2001 and July 31, 2001, and a Bank of America business checking statement for the period ending July 27, 2001.

Like the evidence submitted in response to the RFE, the evidence submitted on appeal presents corporate actions taken after the petitioner filed Form I-129. As established earlier, the Bureau may not approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire, supra*. Therefore, the Bureau

¹ The first sentence of minutes states, however, that the board meeting occurred on June 13, 2001, not June 5, 2001. This discrepancy does not materially affect the outcome of this case.

cannot approve the application based on the new facts submitted on appeal. Moreover, the Bureau will adjudicate the appeal based only on the record proceedings before the director. See, *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Consequently, the AAO cannot approve the petition based on the new evidence that the petitioner submitted on appeal.

The evidence submitted on appeal is further deficient in that it presents unexplained inconsistencies. In particular, the evidence submitted on appeal indicates that the U.S. entity issued 70,000 shares of stock; however, the Articles of Incorporation submitted in response to the RFE state that the U.S. business is authorized to issue only 50,000 shares of stock. The petitioner presented no minutes of board meetings or copies of filings with the State of California to explain how the number of stock shares authorized increased by 20,000 between February 2001 and June 2001. Additionally, the petitioner did not explain who appended the office lease to reflect that 3,000 square of property had been leased. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-2 (BIA 1988) cited with approval in *Spencer Enterprises v. United States of America*, 229 F.Supp. 2d 1025, 1038 (E.D. Cal. 2001). In sum, the inconsistent number of shares issued and inexplicably revised lease cast doubt on the evidence as a whole.

Beyond the decision of the director, the Bureau notes that on April 22, 2001 the petitioner signed a five-year, commercial lease signed for 1229 Judson Street, Seaside, California for an unspecified number of square feet. However, as previously discussed, the petitioner filed its Form I-129 on February 23, 2001. In short, the petitioner had not secured sufficient physical premises to house the new office at the time of filing. Therefore, the petitioner failed to meet its burden under 8 C.F.R. § 214.2(l)(3)(v)(A).

Additionally, beyond the decision of the director, the Bureau notes that the petitioner has failed to demonstrate that the beneficiary was employed in an executive or managerial capacity for one continuous year in the three year period preceding the filing of the petition and that the proposed employment involved executive or managerial authority of the new operation. See

8 C.F.R. § 214.2(l)(3)(v)(B). Specifically, the Form I-129 reported the beneficiary's foreign duties as: "Project manager - directs activities of workers concerned with construction of buildings, roads, pipelines, or other construction projects, studies specifications to plan procedures for construction, orders procurement of tools and materials." The Form I-129 stated that the beneficiary's United States duties would be the same. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, the beneficiary's duties appear to be those of a first-line supervisor rather than those of a manager or executive. See 8 C.F.R. 214.2(l)(1)(ii)(B)(4).

In response to the RFE's request for information about the proposed U.S. duties, the petitioner added, "The General Manager represents the organization in all affairs. He is responsible for the overall activities and business. He is the final Authority [sic] to present all probable solutions[,] activities and business to the three [member] Board of Directors for the financial decisions for the organization. He formulates policies." The proposed job description is vague as it fails to convey an understanding of the beneficiary's proposed daily job duties. The failure to submit adequate supporting documentary evidence does not meet the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Therefore, neither the beneficiary's overseas duties nor his proposed U.S. duties qualify as primarily managerial or executive. However, as the appeal will be dismissed on the grounds discussed, these issues will need not be addressed 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; see generally *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation); *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.