

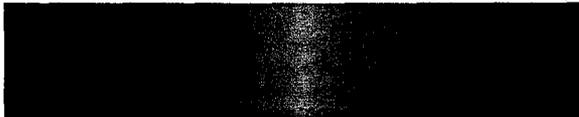


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U.S. Department of Justice  
Immigration and Naturalization Service

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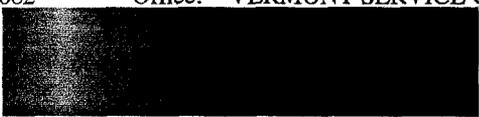
OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: EAC 00 058 51682 Office: VERMONT SERVICE CENTER

Date: JUN 21 2002

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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is in the import and export business. The petitioner seeks to continue the employment of the beneficiary in the United States as its executive manager. The director determined that the petitioner had not established a qualifying relationship between itself and the foreign entity in this case. On appeal, counsel for the petitioner asserts that a qualifying relationship has been established and submits a document dated December 1, 1999 in support of his assertion.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(1)(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 (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 United States petitioner is a business incorporated in the state of New York in January of 1992. The petitioner filed its request for an extension of the beneficiary's L-1A status in December of 1999. It claims gross receipts and sales in the amount of \$1,768,253 for the year 1997 and \$1,678,863 for the year 1998. The petitioner also claims to employ three to four individuals.

The first issue in this proceeding is whether the petitioner has established that it and the foreign entity are qualifying organizations.

8 C.F.R. 214.2(1)(1)(ii)(G) states:

*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.

8 C.F.R. 214.2(1)(1)(ii)(I) states:

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

8 C.F.R. 214.2(1)(1)(ii)(J) states:

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

8 C.F.R. 214.2(1)(1)(ii)(K) states:

*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.

8 C.F.R. 214.2(1)(1)(ii)(L) states, in pertinent part:

*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 initially submitted a letter dated October 22,

1997 signed by the secretary stating that the beneficiary owned 50 percent of its stock. On January 26, 2000 the director requested additional evidence primarily on the issue of the beneficiary's managerial or executive duties. In this request the director also asked that the petitioner supply copies of its latest corporate income tax return. On March 27, 2000 the director requested documentation pertaining to the issue of ownership of the petitioner and the claimed foreign entity to clarify inconsistencies found in the petitioner's statements and its Internal Revenue Service (IRS) Corporation Income Tax Returns.

In response to the director's request for evidence, the petitioner provided a letter dated June 19, 2000 signed by the secretary, stating that the foreign entity in this case was owned by four partners, who each owned an equal 25 percent share of the partnership. The petitioner also submitted a "Partnership Deed" dated October of 1995 confirming that ownership. The letter also stated that the petitioner itself had three shareholders. The petitioner also submitted its Certificate of Incorporation showing that the petitioner was authorized to issue 200 shares of stock.

The director determined that the petitioner had not established a qualifying relationship between itself and the claimed foreign entity. The director noted that the partnership deed submitted showed that four individuals owned equal shares of the foreign company. The director also determined that the ownership of the petitioner could not be determined based on the information provided. The director noted the information provided by the petitioner indicated only that the beneficiary owned 50 percent of the petitioner and that, based on the IRS Corporation Income Tax Returns, one other individual owned 35 percent of the petitioner. The director determined that a qualifying relationship had not been established based on this incomplete information.

On appeal, counsel for the petitioner asserts that the evidence initially submitted with the beneficiary's original petition clearly demonstrated a qualifying affiliate relationship between the petitioner and the foreign entity. Counsel asserts that because that petition was approved and the same supporting documentation was submitted with the extension petition, the extension petition should also have been approved. Counsel also submits a letter from the petitioner's accountant dated November 9, 2000 stating that three individuals own the petitioner with the percentage of ownership being 33 percent, 33 percent, and 34 percent. Counsel also submits a "Deed of Partnership" dated December 1, 1999 but purportedly to be effective April 1, 1999 wherein the foreign partnership was reorganized so that the same three individuals who allegedly own the petitioner now also own the foreign entity. Counsel finally asserts that the foreign entity clearly has more than a 50 percent ownership interest of

the petitioner and thus has the necessary qualifying relationship.

Counsel's assertions are not persuasive. Regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between the United States and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant proceedings). The petitioner has not provided adequate documentation establishing the ownership and control of the foreign entity. The "Deed of Partnership" which was executed to reorganize the ownership of the foreign entity to match the ownership of the petitioner, is insufficient to establish that a transfer amongst the various partners of the foreign entity actually took place. On March 27, 2000 the director specifically requested documentation showing the ownership of the foreign entity. The petitioner indicated in a June 19, 2000 response that four partners owned the foreign entity in equal 25 percent shares. If the ownership of the foreign entity was actually changed on December 1, 1999, that information should have been forthcoming in the response to the director's specific request for evidence, instead of the information that was provided. We note that counsel states that the petitioner did not have access to this document because it was located overseas, but do not find this explanation sufficient in light of the fact that the beneficiary of this petition is allegedly one of the partners of the foreign entity. It is incumbent upon the 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, 19 I&N Dec. 582 (BIA 1988). The petitioner has not explained this significant inconsistency and has not adequately established the ownership and control of the foreign entity.

In addition, the ownership of the petitioner has not been established. The petitioner claimed in the petition that the beneficiary owned 50 percent of its stock. In response to the director's request for evidence, the secretary of the corporation indicated that the petitioning company was owned by three shareholders. The petitioner's IRS Form 1120s for 1997 and 1998 indicate that an officer not the beneficiary owns 35 percent of the stock. The same IRS Form 1120 Schedule K states at line 7 that no foreign person or corporation owns more than 25 percent of the company's stock. Finally, on appeal, counsel for the petitioner submits a document allegedly signed by the petitioner's accountant that provides that the petitioner's stock is owned by three shareholders equally (33 percent, 33 percent and 34 percent). The petitioner has chosen not to provide the underlying stock certificates, stock registry, minutes of relevant annual

shareholder meetings, and other agreements affecting actual control of the entity. Based on the inconsistent representations of the petitioner as to its own ownership and control and the lack of any supporting documentation, the petitioner has not established its ownership and control.

The record lacks sufficient, consistent evidence to establish that a qualifying relationship exists between the petitioner and the foreign entity.

Beyond the decision of the director, the petitioner has not established that the beneficiary has been employed and will 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 submitted a broad position description for the beneficiary that vaguely refers, in part, to duties such as "formulating marketing strategies, evaluating various product lines, formulating and implementing company policies, negotiating contracts, and exercising broad decision-making authority." These statements do not describe the actual duties of the beneficiary with respect to the daily operations of the company. The Service is unable to determine from these statements whether the beneficiary is performing managerial or executive duties with respect to these activities or whether the beneficiary is actually performing the activities. Upon review of the record, the petitioner has not established that a majority of the beneficiary's duties have been or will be directing the organization or the management of the organization. For this additional reason, the petition may not be approved.

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.