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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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



File: WAC 02 113 52836 Office: CALIFORNIA SERVICE CENTER

Date: **AUG 20 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

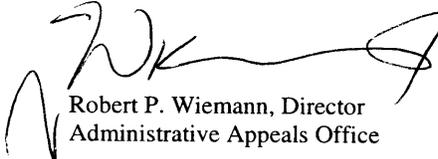
INSTRUCTIONS:

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 the subsidiary of a Philippine business, [REDACTED] Inc. The petitioner describes itself as restaurant. The U.S. entity was incorporated on September 12, 1984 in the State of California. The petitioner now seeks to hire the beneficiary as a new employee. Consequently, on February 15, 2002, the U.S. entity petitioned the Bureau to classify the beneficiary as a nonimmigrant specialized knowledge intracompany transferee (L-1B) for one year. The petitioner seeks to employ the beneficiary as a specialty cook/trainer for the U.S. entity at an annual salary of \$27,400. On February 22, 2002, the director concluded that the petitioner did not qualify as either a subsidiary or an affiliate and that the beneficiary did not qualify as a specialized knowledge worker. Consequently, the director denied the petition. On appeal, petitioner's counsel asserts that the petitioner has a qualifying relationship with the Philippine entity and that the beneficiary qualifies as a specialized knowledge worker.

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 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 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(1)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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.

Initially, the AAO will address the question of whether a qualifying relationship exists between the U.S. and Philippine 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

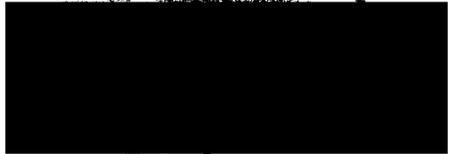
(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

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

In response to the director's May 14, 2002 intent to deny notice, the petitioner submitted certificates describing the stock ownership of the Philippine and U.S. entities. The stock ownership for the Philippine entity is:

<u>Stockholders</u>	<u>Shares</u>	<u>Percentage</u>
	122,598	21.51
	122,598	21.51
	122,598	21.51
	88,202	15.47
	4	-
	1	-
	113,999	20.00
Total	<u>570,000</u>	<u>100.00</u>

The stock ownership for the U.S. entity is:

<u>Stockholders</u>	<u>Shares</u>	<u>Percentage</u>
	50,000	40.00
	25,000	20.00
(a Philippine Corporation)		
	12,500	10.00
	12,500	10.00
	12,500	10.00
	12,500	10.00
Total	<u>125,000</u>	<u>100.00</u>

The petitioner asserts that the family ties among several of the foreign and U.S. entity's stockholders create either a qualifying subsidiary or affiliate relationship. 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 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*.

The petitioner states that [REDACTED] family members own a majority of stock in each corporation. In turn, counsel cites *Sun Moon Star Advanced Power, Inc. v. Chappell*, 773 F.Supp. 1373 (N.D.Cal. 1990), to support the petitioner's view that the familial connections constitute a qualifying affiliate relationship between the entities. *Sun Moon Star* raised the questions of whether, under 8 C.F.R. § 214.2(1)(1)(ii)(L), a corporation can qualify as an "individual" or whether indirect ownership may demonstrate an affiliate relationship. The question here, however, is whether a familial relationship may constitute a qualifying relationship under the regulations. The regulations treat family members as independent individuals. Moreover, the record contains no proxies giving family members control over other family members' stock. Therefore, in this instance, family ties alone cannot establish an affiliate or subsidiary relationship.

Given that family ties are insufficient to demonstrate qualifying relationship in this case, the questions here are whether the same individuals own stock in essentially the same proportions in each entity or whether the Philippine entity owns enough stock to exercise controlling authority over the U.S. entity. The Philippine entity owns only 20 percent of the U.S. entity; therefore, no subsidiary relationship exists between the two companies.

Seven persons and one corporation own stock in the Philippine corporation, with two persons' owning a negligible number of shares. Consequently, the Philippine entity has seven stockholders. In contrast, the U.S. entity has six stockholders; therefore, same group of individuals does not own stock in each company. Even though the two entities have some common shareholders, the common shareholders own significantly different amounts of stock in each company. Therefore, the AAO finds that each individual does not control approximately the same share of each entity. In sum, an affiliate relationship does not exist. As the two companies possess neither an affiliate nor a parent-subsidary relationship, the petitioner has not demonstrated that a qualifying relationship exists. Accordingly, the petition may not be approved.

The AAO now turns to the question of whether the beneficiary qualifies as a specialized knowledge worker. In regard to specialized knowledge capacity, section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

For purposes of section 101(a)(15)(L) [of the Act, 8 U.S.C. 1101(L)], an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulations at 8 C.F.R. § 214.2(1)(ii)(D) define "specialized knowledge":

Specialized knowledge means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The AAO notes that, as the neither the U.S. nor the Philippine entity is a qualifying organization, the beneficiary cannot qualify for an L-1 visa. Assuming the U.S. and Philippine organizations were qualifying, the AAO, nonetheless, affirms the director's finding that the beneficiary is not a specialized knowledge worker. When examining the specialized knowledge

capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(1)(3)(ii).

The petitioner's Form I-129 described the beneficiary's duties during the past three years as: "Maintains level of food costs and ensures all kitchen personnel conform with company standards for cleanliness and sanitation in the kitchen. Implements proper inventory controls, develop[s] new menu recipes, conducts seminars on culinary techniques based on proprietary menus and cultural preparation." In a resume appended to the Form I-129, the petitioner more fully described the beneficiary's duties for the past three years as:

1. Regularly checks if all stocks for the whole day's operation [are] available.
2. Cooks food orders as may be assigned by the Kitchen OIC or Kitchen Supervisor following proper proportioning and procedures.
3. Prepares and cooks employees['] meals.
4. Exercises initiative to help management cut expenses by minimizing food spoilage due to careless handling of food items.
5. Ensures proper use of all kitchen equipment like freezers, food warmers, stoves, and kitchen utensils to avoid unnecessary expenses.
6. Assists co-workers in their duties when necessary.
7. Trains and guides trainees assigned in the kitchen department.
8. Handles the training of student affiliates.
9. Monitors and corrects old employees based on standard procedures and policies.
10. Maintains the cleanliness in assigned area.

Similarly, a January 3, 2002 letter from the petitioner stated, "Presently, [the beneficiary] is also the Kitchen Trainor [sic]

of [REDACTED] branch [in the Philippines]." Additionally, the petitioner reported, "As a Cook/Trainer [sic], his main responsibility is to prepare the ingredients and cook the dishes, and to train the personnel on standardized recipes and procedures."

Finally, a March 3, 2002 letter from the petitioner emphasized the beneficiary's claimed specialized knowledge. Specifically, the petitioner noted that the beneficiary is familiar with the Philippine company's "varied and distinct specialty recipes" and "secret ingredients." The petitioner's March 3 letter also stated:

[The beneficiary] has devised and experimented with age-old recipes and developed new ones for the restaurant. He is particularly impressive in his use of local ingredients to add spice to our traditional dishes. [The beneficiary] developed one of the restaurants' specialty dishes, "sinigang ng tiyan ng bangus."

* * *

His culinary expertise extends to the preparation (and presentation) of our specialty recipes such as adobo, pancit, kare-kare, sinigang na hipon, nilagang baka, bangus and many other specialty recipes . . . that are uniquely Filipino.

The information on the Form I-129, the resume, and the January 3, 2002 letter do not explain or document how the beneficiary's job as a cook or trainer is different from a first-line supervisor's job at any other chain of moderately priced restaurants. In fact, the foreign duties emphasize the beneficiary's role in enforcing standardized practices at one of the restaurant's locations. Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Additionally, counsel's assertions do not constitute evidence.

Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges that the petitioner's March 3, 2002 letter asserts that the beneficiary demonstrated specialized knowledge. However, but for the specific reference to "sinigang ng tiyan ng bangus," the petitioner asserted very generally that the beneficiary experimented with recipes and created new ones. The petitioner submitted a menu to bolster its assertion that the beneficiary created unique dishes; however, the petitioner failed to specify which menu items the beneficiary had modified or created. Finally, in regard to the "sinigang ng tiyan ng bangus," the petitioner did not explain how that dish qualified as unique among Filipino foods. As noted above, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; see generally *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. Additionally, counsel's assertions do not constitute evidence. *Matter of Obaigbena, supra*; *Matter of Ramirez-Sanchez, supra*. In short, the petitioner has not demonstrated that the beneficiary functioned as a specialized knowledge worker for the Philippine entity.

The beneficiary's proposed duties for the U.S. entity are similarly nonqualifying. The proposed duties listed on Form I-129 are: "Prepare ingredients and cook dishes according to proprietary menu. Train kitchen personnel on standardized recipes and procedures. Train kitchen personnel to conform to company standards and procedures." The resume appended to the Form I-129 listed the proposed duties as: "To train cooks and other kitchen personnel on menu upgrades and new authentic proprietary recipes." A February 14, 2002 letter stated, "[The beneficiary] will perform activities in a similar capacity to that which he previously performed while employed by the [Philippine] company." These descriptions are too general to qualify as adequate supporting documentary evidence; consequently, the petitioner has not shown that the beneficiary will serve as a specialized knowledge worker for the U.S. entity.

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; *Transkei*, 923 F.2d at 178 (holding burden is on the petitioner to provide documentation);

Ikea, 48 F.Supp at 24-5 (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.