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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street NW
Washington, DC 20536



FILE: WAC 01 209 54445 Office: CALIFORNIA SERVICE CENTER

Date: DEC 3 - 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:



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 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. claims that it is an affiliate of [REDACTED] a Chilean corporation. The petitioner distributes fresh fruit produce imported from Chile. The petitioner has offices in Gloucester City, New Jersey and Bell Gardens, California. The U.S. entity was incorporated in the State of New York on December 24, 1986. The petitioner now seeks to hire the beneficiary as a new employee. Consequently, on June 11, 2001, the U.S. entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1) for three years. The petitioner seeks to employ the beneficiary as the U.S. entity's quality control manager for the Bell Gardens office at an annual salary of \$45,600.

The director denied the beneficiary's nonimmigrant petition because: (1) the petitioner is neither an affiliate nor a subsidiary of the Chilean company; (2) the beneficiary was not employed abroad in a managerial capacity; and (3) the beneficiary will not be primarily serving as a manager or executive for the U.S. entity. On appeal, the petitioner's counsel asserts that: (1) a qualifying relationship exists between the U.S. entity and the Chilean company; and (2) the beneficiary will serve in an executive or managerial capacity for the U.S. entity.

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.

On appeal, counsel claims the petitioner is a subsidiary, or if not a subsidiary, then an affiliate of the Chilean 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 June 11, 2001. The petitioner provided the following information regarding stock ownership of the U.S. and Chilean entities on the I-129:

The U.S. petitioner is an affiliate of the Chilean corporation. President [REDACTED] owns 60 [percent] of the U.S. corporation and is Marketing Manager of the Chilean corporation; the treasurer of the U.S. corporation, [REDACTED] owns the remaining 40 [percent] of the U.S. corporation and is Operations Manager of the Chilean corporation.

Furthermore, the petitioner attached copies of the U.S. entity's stock certificates to the I-129. The stock certificates revealed that that [REDACTED] owned a total of 120 shares, while [REDACTED] owned a total of 80 shares.

On June 11, 2001, the director issued a request for evidence. The request asked the petitioner to provide in relevant part:

- [A] detailed list of all owners of the foreign company and what percentages they own.
- 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 price. (Emphasis in original.)

In response, the petitioner described the foreign entity's stock ownership as:

Shareholder	Number of Shares	Percent of Shares
[REDACTED]	2,575,500	51
[REDACTED]	1,683,000	33
[REDACTED]	561,271	11
[REDACTED]	280,229	5
Total Shares	<u>5,100,000</u>	

¹ The evidence submitted inconsistently describes this stockholder as [REDACTED] and [REDACTED]. Although this inconsistency may detract from the credibility of the petition, the names all appear to refer to the same person.

Additionally, the petitioner submitted its 1999 Form 1120 U.S. Corporation Income Tax Return. The 1999 Form 1120, Schedule E depicted the U.S. entity's stock ownership as:

Shareholder	Percent of Shares
[REDACTED]	60
[REDACTED]	40

On November 7, 2001, the director issued a second request for evidence. In particular, the request for evidence noted that, although [REDACTED] and [REDACTED] held all the shares in the U.S. entity, nothing in record demonstrated that the Chilean corporation owned and controlled the U.S. entity. Additionally, the director stated that the Chilean corporation's articles of incorporation required that "[t]here shall be a registry kept for all shareholders indicating . . . number of shares each owns" Consequently, the director requested the petitioner to submit a copy of the registry to demonstrate that the foreign entity owned and controlled the U.S. entity. In response, the petitioner submitted a statement from the U.S. entity's managing director/secretary, [REDACTED]. The statement once again depicted the Chilean corporation as having the same four shareholders listed in response to the first request for evidence.

The Chilean corporation owns no shares of the U.S. entity; therefore, the U.S. entity does not qualify as a subsidiary of the overseas company. The AAO acknowledges that two employees of the overseas company [REDACTED] and [REDACTED] own all the shares of the U.S. entity. However, absent the presence of any proxy or similar agreements, the Chilean company cannot control how [REDACTED] and [REDACTED] exercise their shareholder rights. Therefore, the two employees' stock ownership cannot establish that the U.S. entity is a subsidiary of the Chilean company.

Moreover, as the above stock ownership percentages demonstrate, the petitioner's ownership structure does not comply with 8 C.F.R. § 214.2(1)(1)(ii)(L)(2); that is, the same group of individuals does not own and control approximately the same share or proportion of the Chilean and U.S. companies. Specifically, in this instance, the companies share no common owners. As demonstrated above, [REDACTED]

[REDACTED] and [REDACTED] own the Chilean company, while [REDACTED] and [REDACTED] own the U.S. entity. Therefore, the

petitioner has not established an affiliate relationship between the U.S. and Chilean entities.

On appeal, counsel cites *Sun Moon Star Advanced Power, Inc. v. Chappell*, 773 F.Supp. 1373 (N.D.Cal. 1990), as support for petitioner's position. *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 indirect ownership may demonstrate an affiliate relationship. The question here is whether the same individuals own stock in essentially the same proportions in each entity. The AAO acknowledges that the U.S. entity's stock owners hold titled positions in the Chilean company. Nevertheless, absent the presence of any proxy or similar agreements, the Chilean company cannot control how [REDACTED] and [REDACTED] exercise their shareholder rights. Thus, even under the broadest interpretation of the regulations, an affiliate relationship does not exist here.

On appeal, petitioner's counsel cites three unpublished decisions to bolster its arguments regarding corporate ownership and control. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The three cases, therefore, add no precedential weight to the matter at hand. In sum, the counsel's assertions once again fail to demonstrate that the existence of an affiliate relationship.

The AAO now turns to the next issue in this case; that is, whether the beneficiary served at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition and whether the prior year of employment abroad was in a managerial, executive or involved specialized knowledge position. See 8 C.F.R. §§ 214.2(1)(3)(iii) and (iv).

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.

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(1)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner 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.*

On the Form I-129, submitted on June 11, 2001, the petitioner described the beneficiary's duties for the past three years as: "[O]perations and quality control of table grapes to United States, Mexico and Asia-Pacific." A January 16, 2002 letter from the petitioner stated, "[The beneficiary's] main position in Chile was to supervise the exports [sic] of the produce into the U.S." The beneficiary's resume states that he worked for [REDACTED] the foreign entity, from "September 1997 until December 1997" in Santiago, Chile. His duties during that period were, "Field-Quality Control of table grapes and stone fruit throughout Chile." The resume further states that the beneficiary worked for the foreign entity - not the petitioner - in Los Angeles, California, first as a quality control inspector from "December 1997 until May 1998" and then as a quality control international supervisor from "1998 until Today."

The employment dates and locations on the Form I-129 and resume present inconsistent information. The Form I-129 indicates that the beneficiary worked in Chile for three years prior to June 11, 2001. Additionally, the Form I-129 states that the beneficiary entered the United States on November 3, 2000 as a B-1 nonimmigrant visitor. See Section 101(a)(15)(B) of the Act, 8 U.S.C. § § 1101(a)(15)(B); 8 C.F.R. § 214.2(b). In contrast, the resume claims that the beneficiary began working in Los Angeles in December 1997 for the foreign employer.² Consequently, it is unclear from the evidence when the beneficiary entered the United States to begin working. The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide

² Moreover, if taken at face value, the resume would indicate that the beneficiary has been earning income in the United States in violation of his B-1 visitor status. *Matter of Lawrence*, 15 I&N 418, 420 (BIA 1975) (holding that the term "temporary" does not contemplate a potentially limitless visit to U.S.).

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).

Finally, the beneficiary must have served at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition. See 8 C.F.R. § 214.2(1)(3)(iii). As noted above, the resume indicates that the beneficiary apparently only worked abroad for the claimed qualifying organization for at most four months. Therefore, given the petitioner's failure to explain the inconsistent dates and locations, the beneficiary's apparent employment in the United States while on a B-1 visa, and the four month period of employment abroad, the AAO will not disturb the director's decision.

Assuming that the beneficiary demonstrated at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition, the beneficiary's job duties between September 1997 and June 2001 do not qualify as managerial or executive. The Form I-129 characterized the beneficiary's duties in the three years prior to June 2001 as: "[O]perations and quality control of table grapes to United States, Mexico and Asia-Pacific." A January 16, 2002 letter from the petitioner stated, "[The beneficiary's] main position in Chile was to supervise the exports [sic] of the produce into the U.S." The resume stated that from December 1997 until May 1998 the beneficiary served as a quality control inspector. In that job, his duties were to:

- Inspect large volumes of fruit from Chile['s] most established exporter.
- Work with [a] large computer database to prepare fruit inspections.
- Interact with several fruit buyers.
- Interact with one of the largest sales companies on the West Coast regarding marketing decisions.

Furthermore, the resume reports that from "1998 until [t]oday" his job title was quality control international supervisor. In that capacity, his duties were:

- Analy[ze] information on fruit loaded in Chile for the U.S. Market.
- Inform[]the U.S. consignee about special varieties, packaging types, growing region and other pertinent information required by the consignee on every shipment of fruit, before the vessel arrival.
- Assist [Produce Services of America, Inc. (PSA)] Quality Control Manager on the sample selection needed for fruit inspections of each vessel.
- Inform exporter and consignee of fruit condition on every shipment.
- Establish shipping rotation along with PSA's Quality Control Manager and assist [the] shipping department in coordinating orders.
- Assist PSA's management on the communication aspects with the exporters and growers from Chile.
- Assist PSA's Quality Control Manager in specific technical matters.

The duties listed above typify marketing tasks or tasks necessary to produce a product or provide services; therefore, the beneficiary cannot be considered to be employed in a primarily managerial or executive capacity. *Matter of Church Scientology*, 19 I&N Dec. 593, 604 (Comm. 1988). For example, the beneficiary inspected fruit, scheduled shipping rotations, coordinated orders, disclosed fruit conditions upon their arrival to consignees, and interacted with fruit buyers. Thus, the beneficiary's duties actually appear to be those of a first-line supervisor. See 8 C.F.R. § 214.2(1)(1)(ii)(B)(4).

Moreover, the AAO notes that the job descriptions are vague in that they fail to convey an understanding of the beneficiary's daily duties abroad. For instance, the petitioner did not explain what working with a large computer database actually encompassed. Similarly, the petitioner did not define what interacting with fruit buyers meant or what assisting PSA's management or assisting PSA's quality control manager entailed. 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). In sum, the beneficiary's duties during the three year period prior to the petition fail to qualify as primarily managerial or executive.

The third issue is whether the beneficiary's proposed duties for the claimed U.S. entity qualify as primarily managerial or executive. On Form I-129, the petitioner described the beneficiary's proposed U.S. duties as: "Manage quality control of all produce received at petitioner's west coast facilities in the U.S. Communicate with exporter and consignee on produce condition on every shipment."

The petitioner's May 22, 2001 and January 10, 2002 letter further stated that the beneficiary's proposed job as a quality control manager:

[I]nvolves supervising the quality control of fruit shipped from the affiliated Chilean corporation to the West [C]oast. This includes all shipping and customs operations, customer complaints, and administration of all staff which includes anywhere from 4-12 staff members, in the West [Coast] office. He will also act as the main communication channel between the Chilean corporation and growers there, and the West [C]oast consignees.

An additional letter from the petitioner, dated January 16, 2002, stated:

[T]he beneficiary not only checks the produce that is coming into the U.S. for meeting [USDA] approval, he also oversees quality control inspections and/or import documentation. The number of people he supervises is a permanent staff of about seven. This number increases to 20-25 every time a shipment comes in. The amount of produce [the beneficiary] is responsible [for] is approximately \$70 million per year.

Like the beneficiary's claimed duties during the three years preceding June 2001, the proposed job duties typify marketing tasks or tasks necessary to produce a product or provide services; therefore, the beneficiary cannot be considered to be employed in a primarily managerial or executive capacity. *Matter of Church Scientology, supra*. For example, the

beneficiary will "act as the main communication channel between the Chilean corporation and growers there, and the West [C]oast consignees" and check newly-arrived foreign produce to ensure that it meets USDA standards. Additionally, the beneficiary will also oversee quality control inspections and/or import documentation. While overseeing quality control, the beneficiary will supervise a permanent staff of about seven and as many as 20-25 persons when a produce shipment arrives. Consequently, the beneficiary's duties appear - at most - to be those of a first-line supervisor. See 8 C.F.R. § 214.2(1)(1)(ii)(B)(4).

In addition, the proposed job descriptions are vague in that they fail to convey an understanding of the beneficiary's proposed day-to-day responsibilities in the United States. For instance, the petitioner did not explain what tasks supervising all shipping and customs operations will entail. Furthermore, the petitioner did not specify what acting as the main communication channel between the Chilean corporation and the growers there and the West Coast consignees will encompass. Also, the petitioner did not elaborate on what overseeing quality control inspections and/or documentation would involve. The failure to submit adequate supporting documentary evidence does not meet the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. In sum, the beneficiary's proposed duties for the claimed U.S. entity cannot qualify as primarily managerial or executive.

Beyond the decision of the director, the AAO acknowledges that the beneficiary's prior and proposed duties need only be primarily managerial or executive. See Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(A), (B). The petitioner's evidence failed, however, to document what proportion of the beneficiary's duties would be managerial or executive functions and what proportion would be non-manager or non-executive functions. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991); see also *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999). Therefore, given the lack of appropriate documentation, the petitioner has failed to demonstrate that the beneficiary's prior or proposed duties qualify as either primarily managerial or executive.

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.