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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: WAC 01 073 53392 Office: CALIFORNIA SERVICE CENTER Date:

JAN 30 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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: [Redacted]

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 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 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 that 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, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an international restaurant chain, food processor and distributor. It seeks to employ the beneficiary temporarily in the United States as its director of operations. The director determined that the petitioner had not established that a qualifying relationship exists between the U.S. entity and the beneficiary's foreign employer.

On appeal, counsel asserts that an affiliate relationship does exist and submits additional evidence in support of his claim.

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.

At issue in this proceeding is whether a qualifying relationship exists between the U.S. petitioner and a foreign entity.

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 record reflects that the petitioner is owned by [REDACTED]. The record also indicates that a majority of the foreign entity, Onigashima Hompo Co., Ltd., which employs the beneficiary, is owned Mr. [REDACTED].

In a statement submitted in response to the Service's request for additional evidence, counsel provided the following breakdown of ownership interests in the foreign entity:

We have further established that [REDACTED] is the major stock holder in that he owns 18,820 shares of stock of [REDACTED] and is the Chief Executive Officer. His wife, [REDACTED] owns 1,440 shares of the entity and is the Director. Both [REDACTED] and [REDACTED] own more than 50% of the shares of stock and [REDACTED] exercises complete control over the organization.

[REDACTED]
Enterprise Co. Ltd. respectively. Each of these enterprises own 6580 shares of [REDACTED]. Thus [REDACTED] not only owns a majority of the stock of the foreign firm but he also controls it.

Counsel also submitted photocopies of the petitioner's stock certificates reflecting [REDACTED] ownership interest in the petitioning entity, as well as a list of stock holders of the foreign entity, confirming the above breakdown of ownership interests of that entity.

The director denied the petition, concluding that the petitioner failed to establish an affiliate relationship with a foreign entity.

On appeal, counsel submits a brief, arguing mainly that an affiliate relationship exists by virtue of the "high degree of common ownership and management between the two companies either directly or through third entity." Counsel's argument is apparently based in his interpretation of "common ownership" which he claims is the product of [REDACTED] majority ownership of both the U.S. petitioner and the foreign entity. However, counsel's interpretation of "common ownership" is incorrect. 8 C.F.R. 214.2(1)(1)(ii)(L) is clear on the meaning of "affiliate" in that it requires that the U.S. and foreign entities either be subsidiaries which are owned and controlled by the same parent or individual, or that they be owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. In the instant case, counsel readily admits that Mr. [REDACTED] owns 100% of the petitioning entity, while owning only 47% of the foreign entity. Counsel also admits that while [REDACTED] is the sole owner of the petitioning entity, the foreign entity is owned by two individuals [REDACTED] and three entities.

Nevertheless, counsel asserts that despite the fact that [REDACTED] does not own the majority of the foreign entity's shares,

he effectively has control over the organization by virtue of proxy votes. In support of this claim, counsel submits a notarized statement from his wife, signed on May 18, 2001, giving Mr. [REDACTED] voting authority over her shares, and an undated letter, signed by representatives of the three entities with ownership interests in the foreign entity, giving Mr. [REDACTED] similar voting authority over their shares. However, 8 C.F.R. 103.2(b)(12) states, in pertinent part: "An application or petition shall be denied where evidence submitted . . . does not establish filing eligibility at the time the application or petition was filed." In the instant case, [REDACTED] letter is dated more than five months after the petition was filed, and the letter giving [REDACTED] voting control over the remaining shares is not dated at all. Therefore, the petitioner has failed to establish that [REDACTED] had 100% of the proxy votes at the time the petition was filed. In fact, even if the petitioner were able to establish that the beneficiary had all of the foreign entity's voting power, the fact remains that the petitioner is still not be owned by the same group of individuals as the foreign entity. Therefore, the relationship between the two entities cannot be considered qualifying under 8 C.F.R. 214.2(1)(1)(ii)(L)(2).

On review, there is no evidence to demonstrate that a qualifying relationship exists between the U.S. petitioner and the beneficiary's foreign employer. Therefore, the beneficiary is ineligible for L-1 visa classification as an intracompany transferee under section 101(a)(15)(L) of the Immigration and Nationality Act.

Beyond the scope of the director's decision, the record indicates that the petitioner had no authority to file an I-129 petition on behalf of the beneficiary, as the beneficiary intended to come to the United States to be employed by [REDACTED] which, while 50% owned by [REDACTED] is not the petitioning entity. 8 C.F.R. 214.2(1)(1)(i) states in pertinent part that "the organization which seeks the classification of an alien as an intracompany transferee is referred to as the petitioner." Accordingly, the organization which seeks to employ the beneficiary in the instant case is not the organization that filed the Form I-129 petition. However, as the appeal is being dismissed on grounds discussed above, this issue need not be addressed further.

In visa petition proceedings, the burden of proof 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.