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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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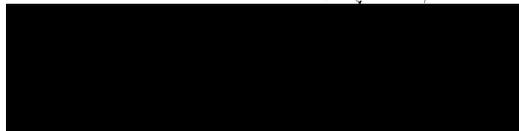


File: WAC 02 050 51896 Office: CALIFORNIA SERVICE CENTER Date: **NOV 21 2003**

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 is described as being in the commercial television and video business. It seeks to employ the beneficiary temporarily in the United States as the president and chief financial officer of its new office. The director determined that the petitioner had failed to establish that a qualifying relationship existed between the foreign and the U.S. entities.

On appeal, counsel contends that a qualifying relationship does exist between the foreign and U.S. entities.

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.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that, 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 over 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 paragraphs (1)(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.

The regulations at 8 C.F.R. § 214.2(1)(3) state 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.

(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.

According to the evidence contained in the record, the petitioner claims to be a subsidiary of [REDACTED] of Japan. The petitioner was incorporated in 2001 and claims to be in the television and commercial video business. The petitioner does not declare any employees and reports no gross annual income. The petitioner seeks the beneficiary's services as a president and chief financial officer for a period of three years, at a yearly salary of \$40,000.

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

The petitioner initially submitted a copy of the U.S. entity's Articles of Incorporation, dated September 21, 2000. In reference to the issuance of stocks, the articles read as follows:

Article VII Authorized Stock

The aggregate number of shares which the Corporation shall have authority to issue is ONE MILLION (1,000,000) shares, all having a par value of ONE DOLLAR (\$1.00) each, and all of which are of one class and designated as common stock.

Article IX Initial Subscribers

The Initial subscriber for shares of stock in the Corporation, the number of shares subscribed for, the subscription price for the shares and the consideration paid there for are as follows:

<u>Name of Subscriber</u>	<u>Number of Shares Subscribed</u>	<u>Subscript. Price for Shares</u>	<u>Amount of Capital Paid in</u>	<u>Manner Paid In</u>
[REDACTED]	550	\$550.00	\$550.00	Cash
[REDACTED]	450	\$450.00	\$450.00	Cash

Article XII Amendment

These Articles may be amended by the affirmative vote of stockholders holding not less than a majority of all the stock of the Corporation issued and outstanding and having voting power at any annual meeting or at a meeting duly called for such purpose.

In response to the director's request for additional evidence, counsel submitted a translated version of the Articles of Incorporation of the foreign entity, which lists the stock distribution as follows:

One unit price 50,000 yen
The number of issued shares 200 stocks

NAME: [REDACTED] 130 stocks

NAME: [REDACTED] 60 stocks

NAME: [REDACTED] 10 stocks

The director denied the petition after determining that the record did not establish that a qualifying relationship exists between the U.S. and foreign entities. The director stated that the evidence presented did not establish that a subsidiary relationship between the U.S. and foreign entities existed because individuals owned both. The director further stated that an affiliate relationship did not exist between the U.S. and foreign entities, in that the evidence of record failed to demonstrate that both companies were owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity.

On appeal, counsel asserts that the director's decision was incorrect, and submits a brief and evidence in support of this contention. Counsel argues that the initial stock issuance concerning the U.S. entity was a mistake, in that the initial shareholders did not understand that all the shares of stock in the U.S. entity should have been placed in the name of the foreign entity since it had provided the capitalization for the U.S. company.

Evidence in the record concerning the qualifying relationship includes: copies of stock certificate number one through four; a September 25, 2001 "Advice of Transfer"; an October 9, 1991 wire transfer, the minutes from a shareholders meeting, and Articles of Amendment.

Stock certificate numbers one through four were each issued on September 21, 2000. Stock certificate number one was issued to [REDACTED] for 550 shares of the petitioner's stock; stock certificate number two was issued to [REDACTED] for 450 shares of the petitioner's stock. The ownership of these stocks is reflected in the petitioner's Articles of Incorporation. Both certificates were cancelled on the same day, however, and the shares transferred to the foreign entity, D-Magic, Inc. of Japan. Stock certificate numbers three and four were issued to D-Magic, Inc. of Japan for 45,000 and 1,000 shares of the petitioner's stock, respectively, on the same date, September 21, 2000.

The "Advice of Transfer" indicates that on September 25, 2001, [REDACTED] the president of the petitioner and the beneficiary of this visa petition, transferred \$45,000 to the petitioner's bank account. The copy of the October 9, 2001 wire transfer indicates that Isamu Yamada, a shareholder of D-Magic, Inc. of Japan, transferred \$45,000 to the petitioner's bank account. The purpose of the transfer is recorded as "company opening fund."

The "Minutes and Corporate Resolution of the Stockholders of D-Magic, Inc. discusses the issuance of the stock certificates, a topic which was allegedly discussed in a board of directors meeting on October 23, 2001. The Articles of Amendment, dated April 24, 2002, indicate that on October 23, 2001, the petitioner's shareholders amended the articles to show that D-Magic, Inc. of Japan owns 46,000 shares of the petitioner's stock, and that [REDACTED] of Japan paid \$46,000 for such

shares. Counsel claims that the minutes of the corporate record of the foreign entity were amended to reflect the stock ownership changes; however, because the U.S. and foreign entity have different legal representation, the U.S. office does not possess records of what, in fact, was recorded in connection with the stock transfers. Counsel concludes by stating that the petitioner corrected the U.S. record to properly reflect the issuance and transfer of the petitioner's shares of stock, and that this process was not an after the fact situation, in that evidence filed with the initial petition reveals capitalization for the U.S. organization came from the foreign entity, and that the corporate records had to be adjusted to reflect the accuracy of the information.

The issue before the Administrative Appeals Office is whether the petitioner is a subsidiary of D-Magic of Japan as counsel claims. 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 immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (Comm. 1988). 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. *Id.* at 595.

Counsel relies upon information in stock certificate numbers one through four, the Advice of Transfer, and the Articles of Amendment to establish that D-Magic of Japan owns and, therefore, controls the petitioner. As shall be discussed, however, none of these documented is credible evidence of the relationship between the U.S. and foreign entities.

Stock certificate numbers three and four, which were issued to [REDACTED] of Japan, indicate that the Japanese company paid \$46,000 for the shares of stock. However, the record does not contain copies of a wire transfer or the petitioner's bank statement for the period in question as proof that the petitioner received \$46,000. Although counsel asserts that [REDACTED] of Japan's ownership of the petitioner is evidenced by a copy of the September 25, 2001 and October 9, 2001 wire transfers, this evidence is not persuasive. First, both wire transfers are dated subsequent to September 21, 2000, the date of the alleged payment for the petitioner's shares of stock. Second, the September 25,

2001 wire transfer indicates that the monies came from the beneficiary, not [REDACTED] of Japan; the October 9, 2001 wire transfer indicates that the monies came from [REDACTED] not the Japanese entity. There is no evidence that either the beneficiary or [REDACTED] was authorized by the Japanese company to transfer funds to the petitioner on its behalf.

It is critical for the petitioner to establish, through the submission of independent objective evidence, that [REDACTED] of Japan paid \$46,000 for its shares of stock on September 21, 2000, as declared on stock certificate numbers three and four. Otherwise, the stock certificates have no probative value. Cf. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). A petitioner's assertions, by themselves, will not suffice to establish the essential elements of ownership and control; supporting documentary is critical. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without evidence of D-Magic, Inc. of Japan's contribution of \$46,000 to the petitioner on September 21, 2000 for the specific purpose of purchasing the petitioner's shares of stock, the Administrative Appeals Office cannot conclude that the petitioner is a subsidiary of [REDACTED] of Japan.¹

The Administrative Appeals Office now turns to counsel's statements regarding the amendment of the petitioner's corporate records concerning its ownership. Counsel states on appeal:

[T]he Minutes of the corporate records of [REDACTED] Inc. of Japan] has [sic] been amended to reflect the foregoing changes and stock issuances and to correct the records of the corporation. . . . After discovering this issue through the denial petition filed by the United States Immigration Service, the records were corrected to properly reflect this issue. This is not an after the fact situation since . . . it is clear that all of the capitalization for the corporation came from [D-Magic, Inc. of Japan], but it was just that the corporate records had not been changed to reflect this information.

¹ The Administrative Appeals Office notes further that the petitioner did not submit a copy of its stock ledger to show the issuance and cancellation of its stock certificates.

Counsel's statements are unpersuasive. The petitioner has not submitted documentary evidence of the critical issue: whether, on September 21, 2000, [REDACTED] Inc. of Japan paid for the shares of stock it claims to own. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho, supra*. Mere assertions that the issuance of paper stock certificates is enough to satisfy the burden of proof do not qualify as independent and objective evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra*. Furthermore, evidence that is created by the petitioner after Citizenship and Immigration Services (CIS) points out the deficiencies and inconsistencies in the petition will not be considered independent and objective evidence. See *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Necessarily, independent and objective evidence would be evidence that is contemporaneous with the event that is to be proven and existent at the time of the director's notice.

The petitioner and [REDACTED] of Japan do not share a parent/subsidiary relationship under U.S. immigration law because there is insufficient evidence that [REDACTED] of Japan owns and controls the petitioner. As the petitioner has not established a qualifying relationship between it and [REDACTED] Inc. of Japan, the petitioner also cannot prevail on its assertion that a qualifying foreign entity employed the beneficiary in a managerial or executive capacity for one continuous year in the three year period preceding the filing of the petition. 8 C.F.R. § 214.2(l)(3)(v)(B). Therefore, the director's decision will not be disturbed.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.