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Citizenship and Immigration Services

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



SEP 09 2003

File: WAC 01 136 50221 Office: CALIFORNIA SERVICE CENTER Date:

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 the Bureau 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 nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a corporation that specializes in wholesaling and retailing general merchandise and the management of real property. It seeks to employ the beneficiary in the United States as its vice president and treasurer. The director determined that the petitioner had not established that a qualifying relationship exists between the United States corporation and a qualifying foreign entity. The director also determined that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel argues that the director erroneously concluded that the proxy submitted with the original filing did not give the beneficiary control of the foreign company and that his 50 percent ownership interest in the United States firm did not vest control of the petitioning entity to him. Counsel states that there is a qualifying affiliate relationship between the United States and foreign companies. Counsel further states that the director erred when he concluded there was no evidence that the beneficiary would perform executive/management duties in the United States.

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 first issue to be addressed in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

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.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(K) state:

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.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(L) state, 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.

In this case, the shares of the petitioning firm are held by two individuals as follows:

	3,000 (50 percent)
	3,000 (50 percent)

The shares of the petitioner's claimed affiliate abroad, Kim Chung-Up Associates, are held by three individuals as follows:

	298,800 (49.8 percent)
	174,000 (29 percent)
	127,200 (21.2 percent)

Counsel emphasizes that evidence submitted with the original petition shows that Mr. [REDACTED] owner of 29 percent of the stock of the foreign entity, executed a proxy authorizing the beneficiary to act in his behalf. Counsel argues that the director should not have discounted that proxy because that document stated that it was revocable. The proxy issued by Mr. [REDACTED] dated March 5, 2001 stipulates that it was to remain in force for four years. Counsel argues that the fact that it could be revoked in the future does not diminish the legal effect of the proxy. On appeal, counsel indicated that a subsequent irrevocable proxy by Mr. [REDACTED]

in behalf of the beneficiary was being submitted as an attachment to his brief in support of the appeal, however the document was not forwarded for the record. If it had been forwarded with the appeal, it would be a material change to the petition and would not establish eligibility at the time of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Izummi*, 22 I&N Dec. 169 (AAO 1998).

Counsel's argument that 49.8 percent ownership by Mr. [REDACTED] of [REDACTED] (the entity abroad) with a revocable proxy from Mr. [REDACTED] establishes that the beneficiary controls [REDACTED] is not persuasive.

In this case, the record demonstrates that the U.S. entity is owned 50 percent by the beneficiary and 50 percent by Mr. [REDACTED]. Despite counsel's argument, the record does not demonstrate that the U.S. and foreign entities are owned and controlled by the same parent or individual, or that the two companies are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. The record does not demonstrate that the beneficiary, Mr. [REDACTED] exercises *de facto* control over [REDACTED] Inc., (the U.S. company) through irrevocable voting proxies or other means. Thus, a qualifying subsidiary or affiliate relationship cannot be shown to exist between the U.S. and foreign entities. For this reason, the petition may not be approved.

The next issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 101(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

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner's president, in a letter dated December 21, 2000 describes the beneficiary's proposed job duties in the United States as follows:

Vice President: Responsible for day to day operation of the corporation, including supervising employees, customer relations, purchase & inventory, and marketing strategies.

Assist President in adopting long term goals and set overall philosophy of the corporation.

Treasurer: Responsible for maintaining corporate books, including proper recordation of receipt(s) and expenditures, communication with outside auditors, and financial reporting to various government agencies.

The description of the beneficiary's job duties is insufficient to warrant a finding that the beneficiary will be employed in a managerial or executive capacity. It appears that, at most, the beneficiary will be performing operational rather than managerial duties. The petitioner has provided insufficient evidence to establish that the beneficiary will be managing or directing the management of a function, department, subdivision or component of

the U.S. company.

Based upon the record, the petitioner has not provided evidence that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve her from performing non-qualifying duties. It appears that the beneficiary is the individual performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others. For this 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.