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FILE: SRC 03 009 50085 Office: TEXAS SERVICE CENTER Date: **APR 26 2004**

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 of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 operating in the United States as a clothing distributor, contractor, and importer. It seeks to temporarily employ the beneficiary as a traffic manager, and filed a petition to classify the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition stating the petitioner failed to establish a qualifying relationship between the U.S. entity and the beneficiary's foreign employer.

On appeal, counsel asserts that the evidence previously submitted establishes an affiliate relationship between the U.S. and foreign entities. In a letter submitted in support of the appeal, counsel claims that the director did not thoroughly review the previously provided documents, as the evidence "shows that one individual . . . owns the majority of both the U.S. (9,000 shares) and Mexican (46,250) companies."

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). 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. In addition, 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.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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 (l)(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 services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue is whether a qualifying relationship exists between the United States organization and the beneficiary's foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(ii) define the term "qualifying organization" and related terms as follows:

- (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 operating 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.

In a letter submitted with the petition, the petitioner explained that the U.S. and foreign entities are affiliates, as they are owned by a majority shareholder, James Brian Mainwaring. The petitioner provided two charts reflecting ownership interests in the two organizations as follows:

Petitioning Organization

James B. Mainwaring	99%
Mark Mainwaring	01%

Foreign Organization

James B. Mainwaring	51.39%
Mark Mainwaring	20.83%
Jaime Cohen	5.55%

Isaac Cohen	5.55%
Elias Cohen	5.55%
Moises Cohen	5.55%
Enrique Cohen	5.55%

The petitioner submitted the Articles of Incorporation for the U.S. company, in which the corporation is authorized to issue one million shares of stock at a par value of \$0.10 per share. The petitioner also included two stock certificates identifying James B. Mainwaring and Mark Mainwaring as owners of 9,000 and 1,000 shares of stock in the U.S. corporation, respectively. Additionally, the petitioner provided the year 1999 U.S. Income Tax Return for an S Corporation, and U.S. Tax Forms 1120S, Schedule K-1, Shareholder's Share of Income, Credits, Deductions for both shareholders.

With regard to the foreign corporation, the petitioner submitted the Articles of Incorporation and the minutes from a March 23, 2002 meeting of shareholders. Reflected in the minutes was the shareholders approval to issue an additional 40,000 shares of stock to James B. Mainwaring for \$40,000, thereby giving him a majority interest of 51.39% in the foreign company. The revised shareholders' interests were noted as:

Mark Brian Mainwaring	18,750 shares
James Brian Mainwaring	46,250 shares
Jaime Cohen Smeke	5,000 shares
Isaac Cohen Smeke	5,000 shares
Elias Cohen Smeke	5,000 shares
Moises Cohen Smeke	5,000 shares
Enrique Cohen Smeke	5,000 shares

In her decision, the director concluded that an affiliate relationship did not exist between the U.S. and foreign entities. The director outlined the ownership of the two companies as follows:

Petitioning Organization

James B. Mainwaring	9,000 shares	99% ownership
Mark Mainwaring	1,000 shares	01% ownership

Foreign Organization

Mark Brian Mainwaring	18,750 shares	37.5% ownership
James Brian Mainwaring	6,250 shares	12.5% ownership
Jaime Cohen Smeke	5,000 shares	10% ownership
Isaac Cohen Smeke	5,000 shares	10% ownership
Elias Cohen Smeke	5,000 shares	10% ownership
Moises Cohen Smeke	5,000 shares	10% ownership
Enrique Cohen Smeke	5,000 shares	10% ownership

The director noted that the evidence "reveals one James B. Mainwaring owns ninety percent of the U.S. business but only twelve and one-half percent of the foreign company," and therefore, the companies lacked

“a high degree of common ownership.” The director consequently concluded that a qualifying relationship did not exist between the two entities.

On appeal, counsel asserts that the director “did not review the documents submitted because both enterprises are owned in the majority by one person, Mr. James Mainwaring.” Counsel submits a letter in support of the appeal, in which she states that the evidence previously submitted demonstrates the existence of a qualifying relationship between the U.S. and foreign entities. Counsel resubmits the evidence, including the minutes from the shareholders meeting in which the foreign company’s capital was increased by 40,000 shares. Counsel explains that Mr. Mainwaring purchased these additional 40,000 shares, “thereby making him the majority owner of the Mexican company.” Counsel states that because Mr. Mainwaring “owns the majority of both the U.S. (9,000 shares) and Mexican (46,250) companies,” a qualifying relationship exists between the two organizations.

On review, the record contains inconsistencies regarding the existence of a qualifying relationship between the U.S. entity and the beneficiary’s foreign employer.

The regulations and case law further confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *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 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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* at 595.

With regard to ownership and control of the beneficiary’s foreign employer, the petitioner submitted sufficient evidence to establish that one person, James B. Mainwaring, is a majority owner of the organization. As reflected in the minutes of the shareholders meeting, an increase in corporate stock in the amount of 40,000 shares to James B. Mainwaring was “approved and exhibited by contribution in cash.” This evidence was a part of the record at the time of adjudication, although it appears that it was not considered by the director. Counsel is therefore correct in her assertion that one person, James B. Mainwaring, is a majority stockholder in the beneficiary’s foreign employer.

With regard to the U.S. entity, the record contains inconsistencies in the actual percentage of ownership in the corporation. The petitioner submitted stock certificates for the U.S. corporation which identify James B. Mainwaring as the owner of 9,000 shares, and Mark Mainwaring as the owner of 1,000 shares. Assuming the corporation has issued only 10,000 shares, James B. Mainwaring and Mark Mainwaring would have ownership interests in the amount of 90% and 10%, respectively.¹ The petitioner, however, notes in Exhibit 7, “Organizational Chart Showing the Corporate Ownership Relationship between the U.S. and Foreign Entities,” that James B. Mainwaring owns 99% of the corporation, while Mark Mainwaring owns 1% of the company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the

¹ The U.S. Tax Form 1120S, Schedule K-1, Shareholder’s Share of Income, Credits, Deductions, for James B. Mainwaring and Mark Mainwaring reflect each shareholder’s ownership interest as 90% and 10%, respectively.

petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The U.S. company's corporate balance sheet contains an additional inconsistency. The balance sheet indicates that 1,000 shares have been issued by the U.S. corporation in the amount of \$1,000. Additionally, in the notes accompanying the financial statements, the corporation's accountant reiterates that "1,000 shares are currently issued and outstanding." As noted above, however, the stock certificates reflect a combined issuance of 10,000 shares of stock to James B. Mainwaring and Mark Mainwaring. Again, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho, supra*. As the petitioner has failed to explain the inconsistencies, the AAO cannot ascertain the true ownership and control of the U.S. corporation, and therefore, cannot conclude that a qualifying relationship exists between the U.S. and foreign entities. *See Matter of Siemens Medical Systems, Inc., supra; Matter of Hughes, supra*. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra* at 591.

Beyond the decision of the director, it remains to be determined whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity. The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991) (Emphasis in original). While the petitioner asserted that the beneficiary will "plan, organize, direct, and control all programs" of the import and export department, the record also shows that the beneficiary will be in charge of all shipments, including reviewing packing lists, invoices and pediments. It is therefore unclear from the record whether the beneficiary would be performing the daily functions of the department, or would be primarily performing in a managerial or executive capacity. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra* at 604. For this additional reason, the petition must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.