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FILE: WAC 01 111 53812 Office: CALIFORNIA 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, 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 a remittance agent and shipper of door-to-door cargo from the United States to the Philippines. It seeks authorization to employ the beneficiary temporarily in the United States as an executive staff assistant, and therefore, petitioned to classify the beneficiary as a nonimmigrant intracompany transferee. In a decision dated January 30, 2002, the director determined that the petitioner had not established that: (1) a qualifying relationship exists between the U.S. company and the foreign company; and (2) the beneficiary had been employed abroad in a managerial or executive capacity.

On appeal, petitioner's counsel asserts that: (1) the petitioner is the parent company of the foreign company and they have a qualifying relationship because, although the parent company owns less than half of the subsidiary, it controls the entity; and (2) the beneficiary's employment abroad has been in an executive capacity.

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.

Initially, the AAO will address the question of whether a qualifying relationship exists between the petitioning company and the foreign company.

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 (l)(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.

The petitioner, Forex Cargo (Cal) Inc., located in Los Angeles, California, claims that Forex Cargo (Phils.) Inc. of the Philippines is a subsidiary of its corporation. In support of this claim, the petitioner submitted a letter stating that the foreign company is a subsidiary as both entities have common shareholders and common members of the Boards of Directors. The petitioner also included a list of the foreign company’s Board of Directors and Articles of Incorporation, which reflect the interests of the seven shareholders as follows:

Linda A. Herrera	62,500 shares	25%
Benjamin M. Carino	50,000 shares	20%

<b>Teodoro M. Carino, Jr.</b>	50,000 shares	20%
<b>Jacob P. Carino</b>	50,000 shares	20%
Erwin C. Labog	12,500 shares	05%
Noel M. Carino	12,500 shares	05%
Leland J. Bihis	12,500 shares	05%

The petitioner also submitted Articles of Incorporation for the parent company and a list of ownership interests in the parent company. The list of six shareholders consists of:

The Chartered Forex	27%
<b>Teodoro M. Carino Jr., Chairman/CEO</b>	18%
<b>Jacob Anthony P. Carino</b>	18%
Jaime P. Carino Jr., Director	18%
Natividad P. Carino, Director	18%
Maria Jayne Carino Araos	01%

Additionally, in regards to stock ownership of each company, the petitioner noted on the petition that the parent controls forty percent of the subsidiary's stock.

In a statement dated August 22, 2001, the director issued a request for the following additional evidence: (1) minutes of the shareholders meetings that reflect the shareholders and the number of shares owned of the parent company; (2) the parent company's stock certificates issued to the present date clearly indicating the name of each shareholder; and (3) the parent company's stock ledger showing all stock certificates issued to the present date.

In response to the request for additional documentation, petitioner submitted a "Secretary's Certificate" only, which indicated the parent company's stockholders as reflected above.

The director denied the petition stating "although significant commonality of ownership may exist between the United States and the foreign entities, common control must exist for there to be a qualifying relationship." As no voting proxies or other agreements were submitted showing that shareholders have relinquished a degree of control of both entities in favor of other individuals holding shares in each company, a qualifying relationship was not established.

On appeal, the petitioner submits a letter asserting that a qualifying relationship exists under the last section of 8 C.F.R. § 214.2(l)(ii)(K), which defines a subsidiary as a legal entity of which a parent *owns, directly or indirectly, less than half of the entity, but in fact controls the entity.* (emphasis added) The petitioner further states that because Mr. Teodoro M. Carino, Jr. is Chairman of the Board of the parent and of the subsidiary, he has "full corporate authority and effective de jure as well as de facto control of both corporations." Two Secretary's Certificates were submitted indicating two separate resolutions adopted by the shareholders of both the parent and subsidiary granting Mr. Carino the right to exercise and perform full corporate authority and control in management, administration and operations of both organizations. The resolution for the parent company was adopted on August 4, 1996; the subsidiary's resolution was adopted on May 28, 2001.

Petitioner's assertions are not persuasive. The regulation and case law confirm that the key factors for establishing a qualifying relationship between United States 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.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) specifically allows the director to request such other evidence as the director may deem necessary. While the petitioner submitted a list of its shareholders and each shareholder's interest, it failed to provide any additional evidence requested by the director that may establish the foreign company as a subsidiary of the U.S. company. Petitioner claims that the U.S. company owns and controls the foreign company as a result of each Board's resolution granting authority and control to Mr. Carino, the chairman of each entity's board of directors. However, the foreign company's board of directors did not adopt this resolution until May 28, 2001, approximately three months after the filing of the petition, dated February 21, 2001. The petitioner must establish eligibility at the time of the filing of the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

In addition, evidence that two of the U.S. entity's stockholders also hold forty percent of the stock of the foreign entity does not demonstrate ownership and control. No evidence was submitted to prove that either of the two common shareholders controls the foreign company through proxy vote. Simply because the two entities have mutual stockholders does not prove that the foreign entity is a subsidiary of the U.S. entity. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The record clearly indicates that the petitioning entity does not maintain a qualifying "affiliate" relationship with the foreign entity. The evidence indicates that the petitioning company is owned by six individuals. The overseas company is owned by seven individuals. Accordingly, the two entities are not "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(l)(1)(ii)(L)(2).

There is no direct evidence in the record to support the petitioner's claim that the U.S. entity owns and controls the foreign entity as a subsidiary. Consequently, it must be concluded that the petitioner has failed to establish a qualifying relationship with the foreign entity as required in 8 C.F.R. § 214.2(l)(1)(ii)(G).

The AAO now turns to the issue of whether the beneficiary has been or will be employed in a primarily managerial or executive capacity.

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.

In a letter submitted with the initial petition, the petitioner described the beneficiary's prior duties abroad, in pertinent part, as follows:

In [the beneficiary's] capacity as Executive Staff Assistant to the Chairman, he was responsible for applying his prior knowledge in customs and tariff laws and his expertise in the various processes and procedures involving legal documentation, examination, processing and release of vital cargo from the Bureau of Customs. He managed and oversaw a wide range of responsibilities of corporate operations including classified or confidential information, government relations, policy-creation, board relations, strategic planning, and daily operations. [The beneficiary] was likewise given discretionary decision-making powers in restructuring obsolete management systems and personnel policies. Most importantly, he monitored the performance of all branch operations to ensure that cargo arriving from the United States and other parts of the world are properly and promptly dispatched and delivered to its intended recipients.

The petitioner further states that the position to be held by the beneficiary in the United States shall involve wide decision-making latitude and managing and overseeing critical functions of the parent company such as

policy creation, strategic planning and visioning, management information systems, strategic business developments and alliances, and monitoring the petitioner's branch operations. The beneficiary's additional duties will include:

[E]nsuring that all U.S. operations are kept abreast of developments in Philippine customs regulations and procedures, and Bureaus of Customs and Imports personnel movements by way of establishing an intra-company real-time network, publishing a monthly bulletin of operations and financial goal achievements, and conducting quarterly management training. Moreover, [the beneficiary] shall spearhead the annual strategic planning conference of all Forex Cargo companies where conference participants will undergo a systematic training of foreign operations thereby allowing a "cross-pollination" [sic] of ideas. Similarly, [the beneficiary] shall conduct workshops whereby various Forex units shall translate the corporate vision and credo of excellence and efficiency into financial goals, annual strategic plans, and plans of action for improvement.

In response to the director's request for evidence, the petitioner submitted an organizational chart of the foreign entity, a list of the five employees supervised by the beneficiary, and a description of the subordinates' job duties. The organizational chart describes the beneficiary as an executive staff assistant to the chairman of the company, and as supervising the following employees: legal counsel, customs liaison officer, secretary/legal assistant, and two liaison officers.

Per the director's request, the petitioner also submitted an organizational chart of the U.S. company, a list of the five employees in the U.S. entity that will be under the supervision of the beneficiary, and a description of the job duties of these employees. As in the foreign entity, the petitioner asserted that the beneficiary will supervise two liaison officers, a franchise manager, an account executive, and a warehouse/cargo tracker. The petitioner also stated, in pertinent part, that:

The beneficiary of this application will be transferred to our US (California) operations primarily because of his extensive experience and expertise in the cargo forwarding business. More than half of his time (50%) shall be spent overseeing all operational aspects of our trade in close coordination with the Vice-President of Operations. Since beneficiary will be directly reporting to Chairman/CEO, he will occupy a sensitive and highly confidential position and will be given wide latitude in decision-making powers over the Operations Department.

A quarter of his time (25%) shall be devoted to formulating cost-saving measures (e.g. strict implementation of delivery dates, shipping fee rebates, etc.) through training of US personnel (East Coast, Northwest, No. California) on specialized processes and [sic] procedures, latest regulations on cargo valuation, *ad valorem* tax computation, brokerage fees assessment as well as updated changes in documentation, examination, processing and release of cargo in the Philippines. Likewise, he shall evaluate actual implementation of cost-saving projects and monitor variances to plan.

The remainder of his time (25%) shall be spent on the critical tasks of policy-creation and strategic planning to achieve our corporate vision of sustained growth. He shall conduct site visits of franchise holders and branches to oversee structured audits and initiate business assessment of customer, market and competitive conditions.

In the decision to deny this petition, the director concluded that the record indicated a majority of the beneficiary's duties have been directly providing the services of the function. In making this determination, the director noted that, according to the organizational chart, the beneficiary supervised only one other employee, a secretary/legal assistant.<sup>1</sup> The director further noted that it must be clearly demonstrated that the executive does not directly perform the function. If the intended executive performs the function itself, the director stated that CIS views the position as a staff officer or specialist, not as an executive. The director also stated that the record was not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties.

On appeal, the petitioner again claims the beneficiary functioned in an executive capacity. In a letter dated February 28, 2002, the petitioner states that the beneficiary performed executive functions by working in close coordination with the appointed Vice-President of Operations, directing and monitoring managers, supervisors and middle management personnel in this department. As such, the beneficiary has direct control and supervision over the operations department of the foreign entity. The petitioner further submits a broad position description stating that the beneficiary "play[s] a big role in the formulation of clear-cut corporation policies coupled with strategic planning and operations," exercises wide latitude in discretionary decision-making "especially in the areas of restructuring, modifying and revising management systems and personnel policies," and, receives instructions from the CEO of the foreign entity only.

Upon review, the petitioner's assertions are not persuasive in establishing the beneficiary has been or will be employed in a primarily managerial or executive capacity. In examining the managerial or executive 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(l)(3)(ii). The petitioner has not provided a sufficient in-depth description of the beneficiary's job duties to conclude that the beneficiary has been or will be working in a managerial or executive position. The evidence submitted contains broad descriptions that the beneficiary "managed and oversaw a wide range of responsibilities of corporate operations," held "discretionary decision-making powers in restructuring obsolete management systems and personnel policies," and "monitored the performance of all branch operations." These statements merely paraphrase portions of the statutory definition of managerial and executive capacity without describing the actual duties of the beneficiary with respect to the daily operations. See §§ 101(a)(44)(A)(iii) and 101(a)(44)(B)(ii) of the Act.

Regarding the evidence submitted describing the beneficiary's position in the parent entity, the petitioner stated fifty percent of the beneficiary's time will be spent "overseeing all operational aspects of our trade in close coordination with the Vice-President of Operations," and the remainder will be devoted to "formulating cost-saving measures through training," and "strategic planning." Again, these broad statements do not establish a complete description of the beneficiary's daily duties and functions. Pursuant to 8 C.F.R. § 214.2(l)(3)(ii), a detailed description of the services to be performed must be submitted to establish that the beneficiary will function in a managerial or executive capacity. Absent such, the AAO cannot conclude that the beneficiary's position was or will be of a managerial or executive capacity. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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<sup>1</sup> The director misread the organizational chart as indicating the beneficiary supervised only one employee. According to the chart, the beneficiary supervises five employees.

Even if the AAO were to concede that the petitioner had submitted a detailed description of the beneficiary's duties, the petitioner has failed to prove that the beneficiary's position is more than a "staff officer," as noted by the director. It must be evident from the documentation submitted that the majority of the beneficiary's actual daily activities will be executive in nature. In the present case, the record demonstrates that the petitioner is responsible for assisting in the procedures and processes of Philippine customs laws in order for cargo to be delivered expeditiously. As the function of the United States and foreign entities is to deliver cargo between the two countries, the beneficiary's described duties actually constitute the performance of the companies' function. In addition, the beneficiary's proposed duties with the parent company include formulating cost-savings measures, evaluating the implementation of such and visiting franchises and branches to evaluate the market. This description does not support a finding that the beneficiary will be employed primarily in a managerial or executive capacity. Rather, the evidence supports a finding that the beneficiary was and will be performing non-qualifying duties of the company. 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*, 19 I&N Dec. 593, 604 (Comm. 1988).

Finally, the petitioner's assertion that the beneficiary has been assisting and will assist in "overseeing" the Operations Department creates a further inconsistency. The organizational charts submitted for both companies clearly designate the individuals serving as Vice-President of Operations for each entity. Neither chart contains notations indicating that the beneficiary's job is related to the Operations Department, nor was further evidence submitted by the petitioner to fully resolve this discrepancy. In fact, each chart clearly identifies the beneficiary's position as an executive staff assistant working solely for the Chairman of each company. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On review, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner's vague descriptions of the beneficiary's past and expected employment in the foreign and U.S. entities do not support a finding that the beneficiary has been or will be managing or directing the management of a function, department, subdivision or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within the organizational hierarchy. In addition, the petitioner has not provided a complete description of the beneficiary's daily duties sufficient to conclude that the beneficiary exercises discretion over day-to-day operations and decision-making. The AAO is not compelled to deem the beneficiary to be a manager or executive simply because he possesses a managerial or executive title.

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.