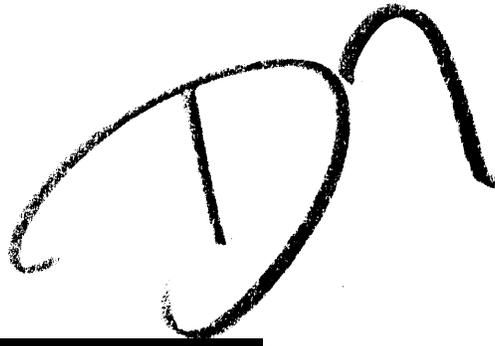




U.S. Citizenship
and Immigration
Services

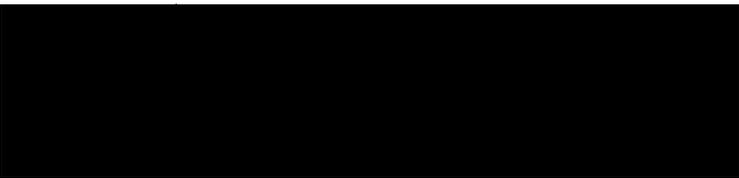


FILE: WAC 02 152 50231 Office: CALIFORNIA SERVICE CENTER Date: APR 28 2004

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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 a new U.S. office operating as an importer and exporter of seafood. It seeks to temporarily employ the beneficiary as its manager, and filed a petition to classify the beneficiary as an intracompany transferee. The director denied the petition concluding that the petitioner failed to establish the existence of a qualifying relationship between the U.S. organization and the beneficiary's foreign employer.

On appeal, counsel asserts that both the U.S. and foreign organizations are owned and controlled by the same individual. Counsel also submits additional documentation, which counsel claims establish the U.S. entity as a branch office of the beneficiary's foreign employer.

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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or 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;

(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 issue is whether a qualifying relationship exists between the U.S. petitioning organization and the beneficiary's foreign employer.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(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.

In the petition and an appended letter, the petitioner stated that the U.S. organization is a branch office of the foreign company. The petitioner explained that as a branch office, the U.S. entity "makes its own decisions, conducts business independently, assumes all risks and pays taxes according to the law." The petitioner submitted documentation pertaining to the U.S. entity, including Form SS-4, application for an employer identification number (EIN), the corporate book, an application for a U.S. trademark, and evidence of a corporate bank account. Additionally, the attached Articles of Incorporation reflect that the U.S. company was incorporated on December 27, 2001, and authorize the corporation to issue 100,000 shares of stock.

In a request for evidence, the director asked that the petitioner submit additional information for both the foreign and U.S. organizations. With regard to the foreign entity, the director requested the company's annual report, the Articles of Incorporation, and a list of owners, including the percentage of ownership held by each. With regard to the U.S. corporation, the director asked that the petitioner submit: (1) the company's annual report; (2) a copy of the minutes from a stockholders' meeting, which identifies the shareholders and percentage of ownership held by each; (3) the U.S. company's stock certificates; and, (4) evidence, including an original wire transfer, that the foreign entity paid for its interest in the U.S. corporation.

In response, the petitioner explained that the foreign entity "is a privately-owned seafood processing enterprise," owned 100% by a Vietnamese national, Quang Van Le. The petitioner also explained that as a privately-owned company, the foreign entity has not issued any stock to the public. Additionally, the petitioner stated that at the time of its response, July 25, 2002, no stock had been issued for the U.S. corporation, but that it was wholly owned by the same individual, Quang Van Le. With regard to the U.S. company's annual report and minutes from a stockholders' meeting, the petitioner noted that neither document is available, as the petitioning organization has not yet started operations in the United States.

The director denied the petition concluding that the petitioner failed to demonstrate a qualifying relationship between the U.S. and foreign entities. The director stated that the petitioning organization did not qualify as a branch of the foreign entity, as the petitioner did not "provide evidence to substantiate the relationship in the form of a Certificate of Qualification and a Statement by Foreign Corporation." The director also noted that as a U.S. corporation, the petitioner must submit evidence describing ownership, such as proof of the number of shares issued or outstanding, the stock certificates, a stock ledger, or wire transfers. The director also reviewed the record as to whether the foreign and U.S. entities possess an affiliate or parent-subsidary relationship, but determined that such a relationship did not exist.

On appeal, counsel asserts that both the petitioning organization and the foreign entity "are owned and controlled by the same individual, Mr. Quang Van Le." Counsel submits the following documentation, and states that the evidence establishes the U.S. corporation as a branch of the foreign entity: the foreign company's investment license, a stock transfer affidavit, a stock certificate, and an affidavit from Quang Van Le. In both affidavits, Quang Van Le, president of both organizations, attests that 100,000 shares of the U.S. corporation's stock were transferred to the foreign entity on September 22, 2002, and that the U.S. corporation "is the USA branch" of the foreign entity. The submitted stock certificate also identifies the foreign organization as the owner of 100,000 shares of stock in the U.S. company as of September 22, 2002.

On review, the record does not demonstrate the existence of a qualifying relationship between the U.S. and foreign entities. The regulations and case law 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.

As noted above, the regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick, supra* at 649-50.

Probative evidence of a branch office includes the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies of IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity. If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

In the present matter, the record does not establish that the petitioning organization is a branch office of the foreign entity. The petitioning organization's Articles of Incorporation confirm that the petitioner is a U.S. corporation. Additionally, in a letter submitted with the petition, the petitioner acknowledges that the U.S. entity "makes its own decisions, conducts business independently, assumes all risks and pays taxes according

to the law.” The petitioner is therefore functioning as a separate legal entity from the beneficiary’s foreign employer. Consequently, the U.S. entity cannot be considered a branch office. *Id.*

Because the claimed branch is incorporated in the United States, CIS will next examine the ownership and control of the petitioning corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. When analyzing this issue, the AAO will review the record available to the director at the time of his review. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner has not established that the U.S. corporation is a subsidiary of the foreign entity. Although the petitioner submitted on appeal a stock certificate identifying the foreign corporation as the owner of the U.S. company, the transfer occurred five months after the petitioner filed the petition. The petitioner must establish eligibility at the time of filing 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). Additionally, in an affidavit submitted on appeal, the president of the U.S. organization admits that in order “to obtain a favorable decision of the US Immigration and Naturalization Service [now CIS]” 100,000 shares of stock of the U.S. company was transferred to the foreign entity. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The evidence available to the director at the time of his review also failed to establish that the U.S. corporation is an affiliate of the foreign entity. While the petitioner asserted that the U.S. corporation “is 100% owned by Quang Van Le,” the petitioner did not submit any evidence, such as a stock certificate or stock ledger, identifying Mr. Le as the sole owner of the petitioning company. In fact, the petitioner, in its response to the director’s request for evidence, stated that no stock certificates have been issued by the U.S. corporation. The petitioner neglected to identify any owner of the U.S. organization. More specifically, the petitioner failed to establish that the U.S. and foreign entities are *owned and controlled by the same individual*. Therefore, the AAO cannot conclude that the two organizations are affiliates.

For the foregoing reasons, the petitioner has not established a qualifying relationship between the U.S. corporation and the beneficiary’s foreign employer.

Beyond the decision of the director, because the record contains conflicting documentation regarding the beneficiary’s position in the foreign company, the petitioner has not conclusively established that the beneficiary was employed abroad in a primarily managerial or executive position. Throughout the record the petitioner identifies the beneficiary’s position in the foreign company as “Assistant Director,” assistant director/manager of business development department, and “Assistant Manager, Export Development Department.” While the petitioner claimed that the beneficiary supervised forty-eight employees of the export department, the organizational chart for the foreign company does not identify the beneficiary or a subordinate staff. The AAO is not compelled to deem the beneficiary to be a manager or an executive simply because the beneficiary possesses a managerial or executive title. Absent additional documentation explaining the beneficiary’s job responsibilities overseas, and the beneficiary’s subordinates and their job duties, the AAO cannot conclude that the beneficiary was employed in the foreign company in a primarily managerial or executive position. For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is whether within one year of approval of the petition the petitioning organization will support employment of the beneficiary in a primarily managerial or executive position. The petitioner noted that the beneficiary would serve as a liaison between the U.S. and foreign entities, informing U.S. customers of the petitioner's presence in the U.S., and creating new accounts. While the petitioner also stated that the beneficiary would spend 40% of his time managing the U.S. corporation and its employees, the record does not support a finding that the majority of his time will be spent performing managerial or executive duties, rather than the non-managerial functions addressed above. 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). 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. Again, the appeal will be dismissed for this additional reason.

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.