

U.S. Department of Homeland Security

Citizenship and Immigration Services

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

FEB 11 2004

File: WAC 01 199 51609 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:

**PUBLIC COPY**

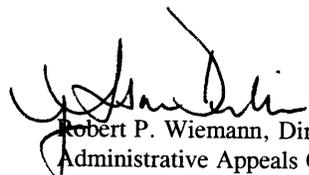
INSTRUCTIONS:

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 claims to be in the business of import/export and distribution of scientific equipment and instruments. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner had failed to establish that a qualifying relationship existed between the U.S. and foreign entities.

On appeal, counsel contends that a qualifying relationship does exist between the U.S. and foreign 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 regulations at 8 C.F.R. § 214.2(l)(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 (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.

\* \* \*

According to the evidence contained in the record, the petitioner claims to be in the business of import/export and distribution of scientific equipment and instruments. The petitioner claims to be a subsidiary of Seo Jin Scientific Co., Ltd., located in Korea. The petitioner was established in 1999 and declares three employees. The petitioner seeks to continue to receive the beneficiary's services as president for a period of three years, at a yearly salary of \$42,000.

At issue in this proceeding is whether the petitioner provided sufficient evidence to demonstrate that a qualifying relationship exists between the U.S. and foreign entities.

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

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).

In the instant matter, the petitioner claims to be a subsidiary of the foreign entity. As evidence of the U.S. entity's stock distribution, the petitioner submitted copies of two stock certificates. The stock distribution for the U.S. entity, S.J.S. Tech Company, is listed as follows:

<u>NAME</u>	<u># OF SHARES</u>	<u>% OF OWNERSHIP</u>
Seo Jin Scientific Co.	500	50
Jong Tae Ha	500	50

The record contains a copy of stock certificate number one, which shows that Seo Jin Scientific Co. was issued 500 shares of the petitioner's 1,000 authorized shares of stock on December 28, 1999. It also contains a copy of stock certificate number

two, which shows that Jong Tae Ha was issued 500 shares of the petitioner's 1,000 authorized shares of stock on April 16, 2001. The petitioner also provided a copy of the stock transfer ledger indicating that Seo Jin Scientific Co. paid \$129,000, and Jong Tae Ha paid \$600,000 for their respective shares.

In the petition, the petitioner indicated that S.J.S. was a subsidiary, which was "100% wholly-owned, controlled and managed by Seo Jin Scientific Co." In the letter of support for the petition, dated May 10, 2001, the petitioner stated that the U.S. entity "is 100% wholly-owned by the parent company in Korea."

The petitioner submitted as evidence a copy of the U.S. Corporate Income Tax Return for the year 2000. It indicated that the U.S. entity was owned, "100%" by a foreign person. It also indicated that the number of shareholders at the end of the year was two. Federal Statement 2 Form 1120, Schedule K, Line 5, dated April 7, 2001 indicates that Jong Tae Ha owns "100%" of the U.S. entity.

The petitioner submitted a table that indicated the status of stockholders in the foreign entity. The stock distribution for the foreign entity, Seo Jin Scientific Co., is listed as follows:

<u>NAME</u>	<u># OF SHARES</u>	<u>% OF OWNERSHIP</u>
Jong Tae Ha	4,000	40
Ji Sung Ha	1,000	10
Sung Gui Kim	4,000	40
Bong Ha Kim	1,000	10

No other information was provided to clarify the ownership and control of the petitioner and the foreign entity.

The director denied the petition after determining that inconsistencies found in the record failed to establish that a qualifying relationship exists between the U.S. and foreign entities. The director stated that it appears one individual, the beneficiary, owns the U.S. entity and that four individuals including the beneficiary owned the foreign entity. The director further stated that the evidence presented did not show

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 director continued by stating that, although significant commonality of ownership may exist between the U.S. and foreign entities, common control must exist for there to be a qualifying relationship. The director also stated that the evidence did not establish an affiliate relationship, nor did it show that an individual, or identical group of individuals, have effective de jure or de facto control of both organizations.

On appeal, counsel asserts that the director's decision was incorrect, and that the evidence submitted establishes a qualifying relationship between the U.S. and foreign entities. Counsel further states that the inconsistency in the number of shares owned by the U.S. entity was a CPA error. Counsel further asserts that the error has been corrected to reflect that the petitioner is 50 percent owned by the foreign entity and 50 percent owned by Jong Tae Ha. The petitioner submits an amended tax return for the year 2000, Form 1120X, signed and dated February 24, 2002. Counsel also contends that Jong Tae Ha and his wife, Sung Gui Kim collectively own 80 percent of the foreign entity's shares of stock, which means that Jong Tae Ha owns and controls 80 percent of the foreign parent company by proxy.

Counsel's assertions are not persuasive. In the instant case, the petitioner is obligated to clarify the inconsistent and conflicting evidence by independent and objective evidence. The delayed filing of amended tax returns raises serious questions regarding the truth of the facts asserted. Cf. *Matter of Bueno*, 21 I&N Dec. 1029, 1033 (BIA 1997); *Matter of Ma*, 20 I&N Dec. 394 (BIA 1991) (discussing the evidentiary weight accorded to delayed birth certificates in immigrant visa proceedings). Merely asserting that the reported shareholders' equity was a "CPA error" does 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*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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. 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.

Furthermore, the evidence of record is not persuasive in establishing a qualifying relationship between the petitioner and the foreign entity. The regulations and case law confirm that 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 visa classification. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *Matter of Church of Scientology International*, 19 I&N Dec. 593 (Comm. 1988) (in immigrant proceedings). 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. *Matter of Church of Scientology International, supra*. In the instant case, the petitioner has submitted inconsistent information. In the petition, the petitioner stated that the U.S. entity is "wholly-owned, controlled and managed" by the foreign entity. The petitioner made the same statement in the letter of support of the petition. Copies of stock certificates issued by the U.S. entity indicated that the entity is owned, 50 percent by the foreign entity and 50 percent by Jong Tae Ha. The petitioner also submitted a copy of the U.S. entity's Corporate Tax Return for the year 2000, which indicated the total number of shareholders at the end of the year was two. Statement 2 Form 1120, Schedule K, Line 5, dated April 7, 2001 indicated that Jong Tae Ha owned 100 percent of the U.S. entity.

Subsequent to the director denying the visa petition, counsel attempts to explain the inconsistency by stating that it was an accounting error that had been rectified. It may be that the discrepancy found in the corporate tax forms was due to an accounting error; however, it does not explain the other inconsistencies that exist in the record. 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 (BIA 1988).

In view of the inconsistencies in the petition, the stock certificates and ledger alone are insufficient to clarify ownership and control of the petitioner. The minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to each shareholder, and the subsequent percentage of ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, the AAO is unable to determine the elements of ownership and control. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel infers that Jong Tae Ha and Sung Gui Kim, as husband and wife, collectively own 80 percent of the foreign entity's stock, and that, therefore, Jong Tae Ha owns 80 percent of the stock by proxy. There has been no evidence submitted into the record to substantiate counsel's claim. The AAO acknowledges that the stockholders apparently share a familial relationship; nevertheless, that evidence alone does not establish a qualifying relationship. Familiar relationships are not the standard used by the AAO in determining whether entities meet statutory and regulatory requirements as qualifying organizations. Familiar relationships can become unfamiliar, thus disturbing, and often times changing, the balance of ownership and control in any given company. Such a standard, if used, would be highly unreliable in discerning corporate ownership and control for purposes of intracompany classifications.

In the instant case, even if the AAO were to consider the amendments made on appeal, the evidence submitted would still be insufficient to demonstrate the extent of control over the U.S. entity. A petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc., supra*. Control may be *de jure* because an individual or entity owns 51 percent of a company's outstanding shares of stock, or it may be *de facto* because an

individual or entity controls the voting of shares through partial ownership and by possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). Without full disclosure of all relevant documents, the AAO is unable to determine the elements of ownership and control. Therefore, it has not been established that the U.S. entity and the foreign entity are affiliated.

Likewise, the petitioner has failed to establish that there is an affiliate relationship between the U.S. and foreign entities as the record does not show that both entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. With respect to the foreign entity, the petitioner has failed to submit copies of the corporate stock certificates, stock certificate ledger, stock certificate registry, corporate bylaws, minutes of relevant annual shareholder meetings, and purchase of shares agreements to demonstrate the entity's qualifying relationship. With respect to the U.S. entity, the record demonstrates that four people own unequal shares of stock in the foreign entity, and that only one of those same individuals owns shares in the U.S. entity. Familiar relationships amongst shareholders cannot be used to establish the existence of a qualifying relationship. In the instant case, the corporate stock certificate ledgers, stock certificate registries, corporate bylaws, and the minutes of relevant annual shareholder meetings must be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control.

Upon review of the entire record, the petitioner has not established that a parent-subsidiary or affiliate relationship exists between the U.S. and foreign entities. Therefore, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary has been or will be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. As the appeal will be dismissed, these issues need not be examined further.

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.