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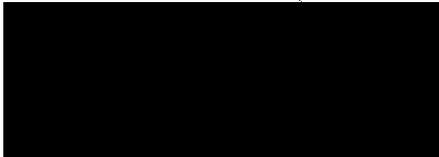
U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



U.S. Citizenship  
and Immigration  
Services

Identifying &  
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FILE: SRC 02 102 53856 Office: TEXAS SERVICE CENTER Date: MAR 30 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

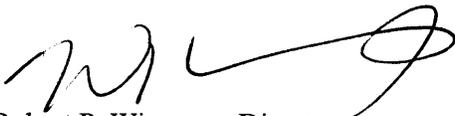
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The petitioner is described as an auto transmission parts business. It seeks to employ the beneficiary temporarily in the United States as its president for a period of three years. The director determined that the evidence was not sufficient to establish that there was a qualifying relationship between the foreign entity and the U.S. entity, or that the beneficiary would be employed primarily in a managerial or executive capacity.

On appeal, the petitioner disagrees with the director's decision and asserts that the evidence submitted was sufficient to establish a qualifying relationship between the U.S. and foreign entities and that the beneficiary will be employed in a managerial or executive capacity.

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 regulation at 8 C.F.R. § 214.2(l)(3) 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.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

*Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge.

According to the documentary evidence contained in the record, the petitioner was incorporated in 2000 as an auto transmission parts business. The petitioner claims that it maintains a qualifying relationship with Transmission Automatica S.A., located in Venezuela. The petitioner declared two employees and \$217,000 in gross annual income. The petitioner seeks to employ the beneficiary's services as president for a period of three years, at a monthly salary of \$1,500.

The first issue to be addressed in this proceeding is whether the petitioner has established that a qualifying relationship exists between the foreign and U.S. entities.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define a "qualifying organization" and related terms as:

(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 operation 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 initially submitted a support letter that presented an overview of the petitioner and the qualifications of the beneficiary. The petitioner submitted a copy of the U.S. entity's stock certificate

number 01, articles of incorporation, and the company's 2000 Form 1120 corporate income tax return. The petitioner also submitted a summarized, translated version of the foreign entity's Mercantile Registry Certificate evidencing a company shareholders meeting that took place on March 7, 1986; translated versions of company bank statements; and translated versions of the foreign entity's general balance sheet and profit and loss statement for the year 1999 through 2000.

In the petition, the petitioner stated that H.F. Olivares owned 100 percent of the foreign entity's stock, and that the foreign entity owned 100 percent of the U.S. entity's stock. The petitioner also submitted a copy of the U.S. entity's articles of incorporation dated July 14, 2000, which stated that the aggregate number of shares which the corporation will have authority to issue is the total sum of one hundred (100) shares, having an individual par value of \$1.00. Article VIII of the articles of incorporation states that the names of the subscribers of the shares of common stock and the number of shares of stock each agrees to take are as follows: "N/A." The petitioner also submitted a copy of stock certificate number one, dated July 14, 2000, issuing Transmission Automatica S.A. 100 shares of the total 100 shares of United Automatic, Inc. corporation stock. The U.S. entity corporate income tax return for 2000 indicated that the entity is not a subsidiary in an affiliated group or a parent-subsidiary controlled group; that no individual, partnership, corporation, owned directly or indirectly 50 percent or more of the corporation's voting stock; and that at no time during the year reported did a foreign person own, directly or indirectly, at least 25 percent of the total voting power of all classes of stock of the corporation entitled to vote or the total value of all classes of stock of the corporation. The tax record also indicated that during the year reported, the corporation was not a member of a controlled group.

The director denied the petition after determining that the evidence submitted by the petitioner was insufficient to establish that a qualifying relationship existed between the U.S. and foreign entities. The director, while recognizing the receipt of a copy of stock certificate number one, determined that the evidence submitted by the petitioner had not established that the U.S. company was a subsidiary of the business abroad. The director further states that the commercial lease agreement was between the lessor and Milton Finol "doing business as" United Automatic and that the credit verification documents such as bills and shipping receipts bear the name Milton Finol rather than the U.S. entity company name. The director also states that the U.S. entity reported on Schedule K of its tax return for the year ending 2000 that the company was not foreign owned, that it was not a subsidiary, and that no individual or organization owned 50 percent or more of the company's stock. The director concluded by stating that the evidence was not persuasive that the company is owned by a business abroad.

On appeal, the petitioner disagrees with the director's reasoning and submits a brief and evidence in support of its contentions. The petitioner contends that the U.S. entity is a subsidiary of the foreign entity. In support of this contention the petitioner resubmits a copy of the U.S. entity stock certificate number one, and submits a copy of the U.S. company by-laws. The petitioner also submitted additional documentary evidence to establish that it is doing business.

Although the petitioner has submitted sufficient evidence to establish that it is doing business, it has failed to establish that a qualifying relationship exists between the U.S. and foreign entities. The record does not reflect that a subsidiary relationship exists between the U.S. and foreign entities as the record does not show that the foreign entity owns, directly or indirectly, more than half of the U.S. entity and controls the entity; nor does it show that the foreign entity owns, directly or indirectly, half of the U.S. entity and

controls the entity; nor does the record reflect that the foreign entity owns, directly or indirectly, less than half of the U.S. entity, but in fact controls the U.S. entity.

In the instant case, the petitioner submitted inconsistent evidence consisting of the U.S. entity's tax return for 2000, stock certificate number one, the U.S. company's articles of incorporation, and other corporate documents. This evidence demonstrates that the U.S. company's stock certificate was issued July 14, 2000, which was prior to the offer being ratified by the U.S. company's directors and incorporators on July 17, 2000. The evidence also shows that the U.S. company's articles of incorporation provided for an aggregate number of shares (100) that the corporation has authority to issue. The corporate by-laws demonstrate that a stock offer for 100 shares of U.S. company stock by the foreign entity was considered and accepted. In comparison, the record reflects that the petitioner did not claim foreign ownership or control over the U.S. entity on its corporate income tax return for the year 2000. The petitioner submitted a tax form entitled "Declaration of Income" on behalf of the foreign entity, which demonstrated that for the period covering January 12, 1999 to November 30, 2000 no deductions for investments were recorded. 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). 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.

In view of the inconsistencies, the evidence submitted is insufficient to establish ownership and control of the U.S. company by the foreign entity. The record does not demonstrate that the foreign entity has actually utilized company funds to purchase shares of stock in the U.S. company nor does it demonstrate that the foreign entity possesses the power and authority to control the management and operations of the U.S. entity. The petitioner has failed to submit bank statements, wire transfers, a stock certificate registry, etc. demonstrating how and when the foreign entity paid for the shares of U.S. company stock. 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 the United States and foreign entities for purposes of this nonimmigrant visa petition. *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, 595 (Comm. 1988) (in immigrant visa proceedings). In the context of this visa petition, 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 Scientology International, supra*.

As general evidence in a non-immigrant petition for an intracompany transferee, vague explanations, unauthenticated agreements and non-descriptive business documents are not sufficient evidence to determine whether an entity maintains ownership and control of a company. Stock certificates, a corporate stock certificate ledger, a stock certificate registry, corporate bylaws, minutes of relevant shareholder meetings, and other relevant documents must demonstrate an element of consistency and be made available for examination in order 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.

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, veto power of the entity, 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, CIS is unable to determine the elements of ownership and control. Hence, it cannot be concluded that the petitioner has established that a qualifying relationship exists between the U.S. and foreign entities.

The second issue 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. § 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 of support dated January 15, 2002, the petitioner describes the beneficiary's proposed duties in the United States as:

1. He will be in charge of all operations of the company. He will be the contact person between the company in Venezuela and the company in the United States. He will plan, develop and establish policies and objectives of the business organization and operation, as well as organizational policies to coordinate functions and operations of the company. (50% of his time dedicated to this duty)
2. Mr. [REDACTED] will direct and coordinate the formulation of financial programs to provide funding for new or continuing operations that can maximize returns. (10% of his time)
3. Mr. [REDACTED] will negotiate all contracts with suppliers and clients. (10% of his time)
4. Mr. [REDACTED] will review production costs and product quality, and will modify inventory control programs to maintain and enhance profitable operations. (20% of his time)
5. He will train and recruit staff. He will supervise the employees to be hired or the services to be contracted by our company, dedicating 10% of his time to this duty.

The petitioner submitted an organizational chart of the U.S. entity that depicted the beneficiary as president, and an import export manager, administrator, and sales executives as his subordinates.

The petitioner also submitted a summary of the beneficiary's proposed duties as:

1. Supervise overall operations.....40%
2. Hire and train personnel as well as sub-contract . . . . .20%
3. Marketing and client development . . . . .20%
4. Make all decisions concerning contracts and Products to be acquired . . . . . 20%

In response to the director's request for additional evidence, the petitioner described the beneficiary's proposed duties as:

1. He is the liaison between the US Company and the Venezuelan Parent Company. He reports directly to the President in Venezuela, Mr. [REDACTED] all operations of the US Company including financial, contractual and personnel affairs. (Dedicating 15% of his time to this duty).

2. He plans, develops and establishes policies and goals of the business organization and operation, as well as organizational policies to coordinate functions and operations of the company (Dedicating 25% of his time to this duty).
3. He directs and coordinates the formulation of financial programs to provide funding for new or continuing operations that can maximize returns. (Dedicating 10% of his time)
4. Mr. ████████ negotiates all contracts with suppliers and customers. (Dedicating 10% of his time to this duty).
5. He is authorized by the Statute to sign the company's checks and to request loans, credits, promissory notes, etc, [sic] on behalf of the company. (Dedicating 15% of his time to this duty)
6. Mr. ████████ reviews production costs and product quality, and may modify inventory control programs to maintain and enhance profitable operations. (Dedicating 15% of his time to this duty).
7. He will be in charge of supervising the recruitment of staff. He supervises the employees to be hired or the services to be contracted by the company. He sets salary benefits, promotions, leaves of absences, etc. (Dedicating 10% of his time to this duty).

The petitioner also stated that the beneficiary would supervise two managers, and presented position descriptions for the vice president, import and export manager, administrator, and sales executive.

The director determined that the record did not establish that the beneficiary would be employed in either a managerial or executive capacity. The director further stated that no evidence was submitted to document that the beneficiary would be in charge of all operations of the company. The director also stated that the petitioner had failed to submit evidence to substantiate its claim that the U.S. entity employed more than two employees, as was initially claimed in the petition. The director determined that the evidence demonstrated that more than the majority of the beneficiary's time would be spent performing non-managerial duties for the U.S. entity.

On appeal, the petitioner asserts its disagreement with the director's decision. The petitioner maintains that the beneficiary has been and will continue to be employed in a primarily managerial or executive capacity. The petitioner also contends that the evidence presented describes a series of functions reserved to the managerial or executive level. The petitioner resubmits a copy of the beneficiary's proposed job duties to support this contention. The petitioner also states that the beneficiary will not engage in day-to-day duties, but will supervise the import and export manager and the administrator, and that the import and export manager will supervise the two sales executives. There has been no additional evidence submitted to substantiate the assertions.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive position. The petitioner has not provided a comprehensive description of the beneficiary's purported duties. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervising personnel who can relieve him from performing nonqualifying duties. There is no indication from the U.S. entity's 2000 Form 1120 income tax return that salaries or wages were paid by the company in that year. There have been no payroll records, payroll summaries, or Form 941 quarterly wage reports submitted to establish the length of employment by any employees of the U.S. entity.

Furthermore, the record does not establish that a majority of the beneficiary's duties will be primarily directing the management of the organization. To the contrary, the record indicates that primarily the beneficiary's duties will consist of performing the sales and marketing services of the business. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring and firing of personnel, discretionary decision making, and setting company goals and policies constitute significant components of the duties to be performed by the beneficiary on a day-to-day basis. Nor does the record demonstrate that the beneficiary will primarily manage an essential function of the organization. Although the petitioner asserts that the beneficiary will be managing an essential function of the organization by overseeing all the import and export and sales for the organization, the record does not demonstrate that the beneficiary will be primarily managing or directing, rather than performing, the function. Based upon evidence submitted on the record, the beneficiary appears to be a sales representative rather than an individual who manages a function of the organization.

Likewise, it cannot be found that the beneficiary will be employed primarily in an executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that he will be primarily directing the management of the organization or a major component or function of the organization, that he will be establishing goals and policies, that he will be exercising a wide latitude in discretionary decision-making, or that he will receive only general supervision or direction from higher level individuals. The record contains descriptions of the beneficiary's proposed job duties that essentially paraphrase the essential elements of the statutory definitions of manager and executive. Paraphrasing the regulation as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary will be acting in 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). Furthermore, the record does not demonstrate that the U.S. entity contains the organizational complexity to support the proposed executive staff position.

Moreover, the petitioner has not shown that the beneficiary will function at a senior level within an organizational hierarchy other than in position title. The petitioner submitted copies of the foreign entity's salary reports for the periods covering January 2000 through December 2000 and January 2001 through September 2001, which classify the beneficiary as an "analyst" rather than as a manager or executive. While it is apparent that the beneficiary's experience could be an asset to furthering the petitioner's business objectives, it does not appear that the petitioner is prepared to employ the beneficiary in a primarily managerial or executive capacity.

In conclusion, the petitioner has failed to present evidence sufficient to establish a qualifying relationship between the U.S. and foreign entities or that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity.

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.

