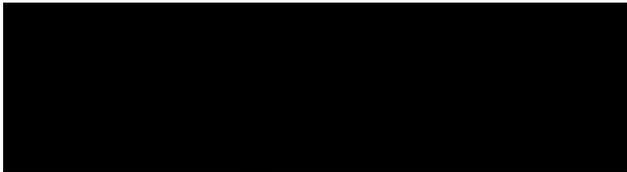


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U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 1 Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: SRC 03 052 51037 Office: TEXAS SERVICE CENTER Date:

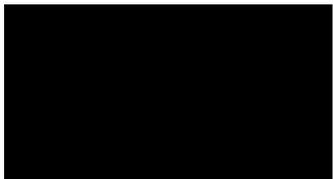
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IN RE: Petitioner:
Beneficiary:



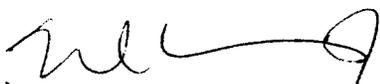
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner is an organization incorporated in October 1977 in the State of Texas. It operates an extended-stay hotel. It seeks to extend the employment of the beneficiary temporarily as its general manager and vice-president. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner claims it is affiliated with Hotel California, S.A. de C.V., a company organized in Mexico and located in Mexico City, Mexico.

The director denied the petition observing that the petitioner's ownership was different than that of the foreign entity. The director concluded that the petitioner had not established eligibility for this visa classification.

On appeal, counsel for the petitioner asserts that the regulations do not require the ownership of the petitioner and the foreign entity to be identical.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether 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 the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and,
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The facts on this issue in this matter are not disputed. The ownership of the two entities is:

<u>Shareholder</u>	<u>Petitioner</u>	<u>Foreign Entity</u>
Jose Manuel Pinon Doniz	38%	40%
Jose Manuel Pinon Alba	30%	40%
Josefina Pinon Alva	16%	8%
Marco Antonio Pinon	16%	0%
Gumerindo Garcia Sanchez	0%	8%
Antonio Dominguez Lopez	0%	4%

Counsel contends that the minor variances in the percentages of ownership of individual shareholders in the petitioner and the foreign entity are not significant for purposes of determining whether the two entities are affiliated under the L visa regulations. Counsel asserts that the same three shareholders in each entity together own well in excess of a majority interest in each entity, and thus, the petitioner and the foreign entity are in fact under common ownership and control. Counsel references case law in support of his assertions.

Counsel's assertions are not persuasive. If one of the petitioner's shareholders owned a majority interest in the petitioner and in the foreign entity, and the one individual controlled both companies, then the companies would be considered affiliates under the definition even if there were multiple owners. In this matter the record shows that four individuals own the petitioning entity in the United States and five individuals own the foreign entity. No one individual owns a majority interest. 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)(emphasis added).

Counsel's citation of *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990) is not persuasive. In the *Sun Moon Star* decision, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a holding company. The decision further noted that the same group of individuals did not own the two claimed affiliates. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. See 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this matter, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

As noted above, four individuals own the U.S. entity and five individuals own the foreign entity. Absent documentary evidence such as voting proxies or agreements to vote in concert so as to establish a controlling interest, the petitioner has not established that the same legal entity or individuals control both entities. Thus, the companies are not affiliates as both companies are not owned and controlled by the same individuals. Counsel references the familial relationship between three of the shareholders in each entity whose holdings comprise a majority interest in each entity. However, absent voting agreements or proxies, a familial relationship by itself, does not constitute a qualifying relationship under the regulations.

Based on the evidence submitted, it is concluded that the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations.

Beyond the decision of the director, the record does not demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The petitioner indicates that the beneficiary will manage all aspects of the hotel and that his duties will include supervising day-to-day operations, customer service, financial controls, and supply inventory.¹ The petitioner notes that it currently employs four individuals. The AAO observes that the record shows that the petitioner has employed the beneficiary's brother as the petitioner's president.

When examining the executive or managerial 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's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* In this matter the petitioner has provided a nonspecific description of the beneficiary's duties. 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).

Moreover, other than the beneficiary's position as general manager/vice-president and the beneficiary's brother's position as president, the record does not include information on the positions of other employees or their daily duties. 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). The record does not include sufficient evidence to determine that the petitioner employs sufficient personnel to relieve the beneficiary from performing primarily non-qualifying duties. 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). The petitioner has not established that the beneficiary's assignment for the petitioner will be primarily managerial or executive.

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

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.

¹ The petitioner included the December 1, 1999 letter that had been submitted with its initial petition to qualify the beneficiary as a manager or executive. The December 1, 1999 letter indicated that the beneficiary initially would supervise the reconstruction and expansion of the petitioner's hotel facility. The petitioner indicated that the reconstruction would be completed by April 2000 and that an estimated 20 employees would be hired when the hotel operations resumed.