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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



FILE: WAC 02-151-53592 Office: CALIFORNIA SERVICE CENTER Date:

OCT 25 2004

IN RE: Petitioner:
Beneficiary:

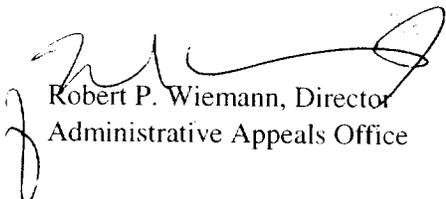


PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER: 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

identifying data deleted to
prevent unwarranted
invasion of personal privacy

FEDERAL GOVERNMENT

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 incorporated in the State of California in December 2001. It operates a hardware firm. It seeks to temporarily employ the beneficiary as its import/export general manager. 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 that a "close family corporation" owns its stock. The beneficiary's foreign employer is Sunlite Hardware & Auto Supply, located in Manila, Philippines.

The director denied the petition concluding: (1) that the petitioner had not established that the beneficiary's foreign position was a managerial or executive position; (2) that the petitioner had not established that it had the financial capacity to operate a viable business in the United States or to support the employment of executive/managerial personnel; and, (3) that the petitioner had not demonstrated that the foreign entity had paid for its interest in the petitioner, thus establishing a legitimate subsidiary relationship with the petitioner.

On appeal, the petitioner contends that a qualifying relationship has been established, the foreign entity's investment is reasonable, and the beneficiary will perform an executive function.

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)(v) states 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 (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

- b. 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
- c. the organizational structure of the foreign entity.

The first 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 (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 stated on the Form I-129, Petition for a Nonimmigrant Worker, that: "Being a close family corporation, stock ownership held by family members." The petitioner submitted its stock certificate number 101, dated December 15, 2001, issuing 55,000 shares to Sunlite Hardware & Auto Supply. The petitioner also submitted its Nevada Articles of Incorporation indicating the petitioner had 125 shares without par value. The petitioner's number of shares with par value was left blank on the petitioner's Articles of Incorporation Form. The record also contained a Certificate of Registration for Sunlite Hardware & Auto Supply showing Mylene Uy had registered the foreign entity in November 1997.

On May 30, 2002, the director requested that the petitioner submit copies of all the U.S. entity's stock certificates, its stock ledger, and proof of stock purchase including copies of wire transfers from the parent company.

In an August 23, 2002 response, the petitioner provided its stock certificate number 102 issuing 25,000 shares to Mylene Uy in April 2002. The accompanying partial stock ledger shows only 55,000 shares issued to Sunlight¹ Hardware & Auto Supply. The petitioner submitted a certification signed by its corporate treasurer stating that Sunlight Hardware & Auto Supply owned 55 percent of the petitioner's shares and that Mylene Uy owned 25 percent of the petitioner's shares. The petitioner also included a copy of an April 15, 2002 confirmation of telegraphic transfer showing \$1,934 had been transferred from a Philippine bank to the petitioner. The confirmation did not identify the originator of the wire transfer. The petitioner also submitted a statement from a California bank showing that on April 15, 2002, wired funds in the amount of \$1,902.13 had been credited to the petitioner's account. The statement identified Mylene Uy as the originator of the transferred funds.

The director observed that it appeared from the record that Mylene Uy owned the claimed parent company but determined that the record contained insufficient evidence to establish that the foreign entity had paid for the stock purportedly issued to the foreign company.

On appeal, the petitioner acknowledged "[a]lthough there might be a limited wire transfer activities, a wire transfer of \$21,000 is forthcoming to coincide with beneficiary's arrival in the United States." The petitioner contends that the official issuance of the stock certificates proves payment for the purchased stocks.

The petitioner's contention is not persuasive. 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 Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In 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*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R.

¹ The record identifies the foreign entity as Sunlite Hardware & Auto Supply as well as Sunlight Hardware & Auto Supply.

§ 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In this matter, the petitioner has presented confusing evidence regarding its ownership and control and has not presented evidence that the foreign entity paid for its shares. First, the petitioner's Articles of Incorporation limits the authorized number of shares to 125. Second, the petitioner indicates that [REDACTED] owns either 25,000 shares (as evidenced by the stock certificate) or a 25 percent interest in the petitioner (as certified by the corporate treasurer). Third, the only evidence of payment for shares is the wire transfer of \$1,934 that the petitioner's bank identifies as transferred from [REDACTED]. Fourth, the petitioner's stock ledger does not include the petitioner's stock issued to [REDACTED]. Finally, as the director determined, the record does not contain evidence that the foreign entity paid for the petitioner's shares issued to it. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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 contain sufficient evidence establishing a qualifying relationship between the foreign entity and the U.S. petitioner.

The second issue in this proceeding is whether the beneficiary was employed in a managerial or executive capacity for the foreign entity in one of the three years preceding the beneficiary's application for admission into the United States.

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.

The petitioner on the Form I-129 indicated that the beneficiary's duties for the foreign entity included "[o]verall and general management of the company; directly supervise the administrative, financial and technical staff of company; executes and implements corporate policies and business strategie[s] [,] organize staff, hire, and fire employees[.]" The foreign entity also submitted a February 12, 2002 document certifying that the beneficiary "is the incumbent Import and Export General Manager," and that the beneficiary "is very highly skilled and experienced individual and poses [sic] an excellent management background.

The director requested the foreign entity's organizational chart listing all employees under the beneficiary's supervision by name and job title and including a brief description of their job duties, educational levels, and annual salaries. The director also requested a more detailed description of the beneficiary's duties and an indication of the percentage of time the beneficiary spent in each of the listed duties.

In response, the petitioner provided its organizational chart showing the beneficiary as general manager on the same tier as the "department head," and the proprietress/cashier/controller on the level just below the "department head." The chart also showed a purchasing manager and a sales manager reporting to both the beneficiary and the "department head." The record before the director contained no further details regarding the beneficiary's duties for the foreign entity.

The director determined that the petitioner had not established that the beneficiary's duties abroad were at the executive or managerial level, but that the beneficiary's duties at most involved supervision of low level employees rather than directing activities through executives, managers, or professionals.

The petitioner does not address the director's determination as it relates to the beneficiary's duties for the foreign entity.

The AAO affirms the director's decision on this issue. The record does not contain evidence detailing the beneficiary's actual job duties for the foreign entity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The foreign entity's organizational chart is confusing, as the foreign entity's corporate structure appears to employ two individuals, the beneficiary and the "department head," as the individuals jointly supervising subordinates. The petitioner's failure to detail the beneficiary's role in the foreign entity or explain how her role enhances or otherwise contributes to the actual operations of the foreign entity limits the ability to determine whether the beneficiary is performing in an executive or managerial capacity for the foreign entity. Moreover, the petitioner's failure to adequately respond to the director's request for evidence on this issue undermines the petitioner's claim that the beneficiary's position for the foreign entity is managerial or executive. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The remaining issue in this proceeding is whether the beneficiary will be employed in the United States in a primarily managerial or executive capacity within one year of approval of the petition. As set out in 8 C.F.R. § 214.2(l)(3)(v)(C), to determine whether the intended United States operation will be able to support an executive or managerial position, the petitioner must submit information regarding:

- a. the proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
- b. 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
- c. the organizational structure of the foreign entity.

On the I-129 petition, the petitioner noted that the beneficiary's duties for the petitioner would include:

To set up a U.S. company: Overall management of company; in charge of development market; develop, train, hire staff; institute marketing & management strategies compatible w/ parent company; promote or otherwise secure products for & on behalf of parent company; search new products & equipment in U.S. w/ potential market of parent company in the Philippines.

The director requested additional evidence including: (1) evidence that sufficient physical premises had been secured; (2) the projected total investment in the U.S.; (3) evidence of the petitioner's current capital supported by copies of wire transfers and bank accounts; (4) a detailed description of all start-up costs to open a new office in the United States; and, (5) the petitioner's hiring plan including the proposed number of employees and types of positions needed within 12 months.

In response, the petitioner provided a copy of a lease agreement and pictures to establish it had sufficient physical premises to open a new office. The petitioner provided a one-page document dated August 10, 2002 entitled "Business Plan." This document listed the beneficiary's proposed position as general manager and indicated that she would be responsible for "the overall operation of the U.S. entity. She will have the final say in hiring and firing of employees." The petitioner also identified two prospective employees, one who

would be responsible for the management and accounting of the firm and one who would be in charge of all marketing plans and programs subject to the general manager's approval. The petitioner also indicated that the individual in charge of marketing would also supervise the daily activities of three salespersons. The petitioner noted that a hiring plan would be submitted in detail upon approval of the petition.

The petitioner also provided its California Form DE-6, Employer's Quarterly Wage Report for the quarter in which the petition was filed. The California Form DE-6 listed one individual who was identified on the petitioner's submissions as its corporate treasurer and as the individual in charge of all marketing plans and programs.

The petitioner also submitted a letter from the foreign entity's bank indicating that the foreign entity had P1,052,100 in its account and its bank statement indicating that the petitioner had \$4,830.02 in its checking account as of August 2002. The petitioner also submitted a title for an automobile.

The director noted the petitioner's limited funds and observed that the foreign entity had not wired additional funds to the U.S. subsidiary. The director determined that the foreign entity had not invested an adequate amount of capital for the U.S. entity to commence doing business in the United States. The director also noted the petitioner's plans to hire employees but determined that the beneficiary's future duties would consist of supervising low-level employees instead of managing other managers or professional employees. The director concluded that the petitioner had failed to establish that the beneficiary would function in a managerial or executive capacity.

On appeal, the petitioner asserts that the beneficiary will function in a managerial capacity, will oversee the operations of the U.S. entity, and will supervise managers and executives and not low-level employees. The petitioner indicates that the operation and marketing manager will direct sales and marketing and will report directly to the beneficiary. The petitioner states that the initial investment in the U.S. entity was \$9,000 and that an additional \$30,000 will be forthcoming upon the arrival of the beneficiary.²

The petitioner's assertion is not persuasive. The record does not contain sufficient evidence to establish that the United States operation will be able to support an executive or managerial position within one year from the approval of the petition. The petitioner has not sufficiently described the proposed nature of the office, its scope, its organizational structure, or its financial goals. The record indicates that the petitioner is a hardware firm that the beneficiary will use to "promote or otherwise secure products for & on behalf of parent company; search new products & equipment in U.S. w/ potential market of parent company in the Philippines." This description does not effectively convey the intended nature of the United States entity. Moreover, the petitioner does not provide a proposed organizational chart. The petitioner only proposes that the beneficiary will supervise an individual who will supervise three salespersons. Again, without more detail regarding the nature and scope of the petitioner, the AAO cannot determine that the U.S. entity will be sufficiently operational to support a managerial or executive position within one year of approval.

Similarly, the petitioner does not provide documentary evidence of the United States investment despite the director's request for this information. The non-existence or other unavailability of required evidence creates

² The petitioner in a preceding paragraph in its letter of appeal stated that a wire transfer of \$21,000 is forthcoming to coincide with the beneficiary's arrival in the United States. The record does not contain information that explains this discrepancy.

a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Although the petitioner has submitted evidence that the foreign entity has the financial ability to remunerate the beneficiary and commence doing business in the United States, the foreign entity has premised its commitment to the petitioner on the beneficiary's arrival in the United States. The petitioner has clearly failed to meet the regulatory requirements of 8 C.F.R. § 214.2(l)(3)(v)(C).

In sum, the documentation submitted does not establish that the beneficiary will be employed in a primarily managerial or executive capacity within one year of approval of the petition. While the petitioner has submitted evidence that it possesses the necessary premises to begin doing business in the United States, the record does not contain a detailed business plan in which the company's policies, strategies, and financial goals are clearly defined. Nor does the record include a sufficient description of the petitioner's proposed organizational hierarchy or that of the foreign entity. The petitioner must demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

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.