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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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File: WAC 03 148 52172 Office: CALIFORNIA SERVICE CENTER Date: **JUL 29 2005**

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)

IN 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, 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 seeks to employ the beneficiary temporarily in the United States as an L-1A 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 U.S. petitioner, a corporation organized in the State of California, is engaged in the import, distribution, and sale of sport shoes and related items and seeks to employ the beneficiary as its sales manager. The petitioner claims that it is the subsidiary of Southern Import and Export Co. Ltd., located in Kowloon, Hong Kong.

The director denied the petition, determining that the petitioner had failed to establish that the petitioner and the organization which employed the beneficiary in Hong Kong were qualifying organizations.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner submits a brief and additional evidence which seeks to clarify the petitioner's relationship with the foreign entity.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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) 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 primary issue in the present matter is whether the petitioner and the foreign organization are qualified organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). The regulation defines the term “qualifying organization” as 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.

Additionally, the regulation at 8 C.F.R. § 214.2(l)(1)(ii) provides:

- (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, or
 - (3) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the

agreement with the worldwide coordinating organization of which the United States partnership is also a member.

In this case, the petitioner claims that the U.S. entity is the subsidiary of the foreign entity. The director found the initial evidence submitted with the petition to be insufficient to qualify the petitioner for the benefit sought and consequently issued a request for evidence on April 18, 2003. In the request, the director required the petitioner to submit evidence that definitively established its qualifying relationship with the foreign entity.¹ On June 5, 2003, the petitioner submitted a detailed response to the director's request which was accompanied by supporting documentary evidence regarding the beneficiary's duties and the financial status of the U.S. entity. With regard to the qualifying relationship between the U.S. and foreign entities, counsel merely submitted a statement regarding the nature of the relationship of the entities accompanied by an excerpt from the Immigration Law Services Handbook discussing intracompany transferees.

Upon review of the evidence submitted, the director concluded that the U.S. entity was not majority owned or in the alternative that it was controlled by the foreign entity and was thus not a subsidiary of the foreign entity as defined by the regulations. Specifically, the director noted that the U.S. entity was owned equally by two companies, and it had not demonstrated that these entities were engaged in a joint venture, as provided for in 8 C.F.R. § 214.2(l)(1)(ii)(K). Consequently, the director denied the petition on June 16, 2003.

Counsel for the petitioner appealed the decision, asserting that the U.S. entity was in fact a subsidiary of the foreign entity. In support of this contention, the petitioner provided an affidavit from the general manager of the U.S. entity attesting to the relationship between the entities.

The regulation 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*, 19 I&N Dec. at 595.

Upon review of the record of proceeding, the petitioner has not established that it has the required qualifying relationship with the foreign entity.

In this case, the petitioner has provided documentary evidence outlining the shareholder interests in the U.S. and foreign entities, and has supplemented this evidence with explanatory statements which discuss the percentages of shareholder ownership. Specifically, the statements of counsel accompanying the initial petition claimed that the U.S. entity is equally owned by the foreign entity and another company. The corporate documentation accompanying the petition clearly supports this contention.

¹ The request for evidence also required the petitioner to submit additional evidence with regard to the viability of the U.S. entity, its projected income statement, and a description of the duties of the beneficiary and how they qualified her as a manager or executive.

Upon initial review of the petition, the director found this evidence to be insufficient to establish that the U.S. entity was a qualifying subsidiary of the foreign entity, and therefore issued a request for additional evidence and clarification on this issue. Specifically, the director stated:

The evidence in the record reflects that Southern Trading Import & Export Co. Ltd. of Hong Kong owns only 50% of the U.S. entity. Therefore, there is insufficient evidence to demonstrate that the U.S. entity is a qualifying subsidiary of Southern Import & Export Co. Ltd. of Hong Kong. Please clarify.

In response to the director's request, counsel submitted a statement dated June 5, 2003, which suggested that a joint venture relationship may exist among the parties. Specifically, counsel for the petitioner declared that it enclosed a copy of Section 101(a)(15)(L) of the Act, which stated that "a 50-50 joint venture may create a subsidiary relationship." Counsel indicated that the U.S. entity, a California corporation, was equally owned by two parent companies. Although counsel provided no further commentary or evidence with regard to this matter, it is clear that this statement was intended to persuade the director that the ownership composition of the U.S. entity met the definition of subsidiary.

On appeal, counsel for the petitioner claims that the director erroneously determined that the U.S. entity was not a subsidiary of the foreign entity based on his reliance on the definition of "joint venture" set forth in *Black's Law Dictionary*. Counsel maintains that the U.S. entity is the subsidiary of the foreign entity by way of the foreign entity's ownership of 50% of the U.S. entity, and therefore a qualifying relationship exists pursuant to 8 C.F.R. 214.2(l)(1)(ii)(K). Counsel simultaneously confirms that its relationship with its co-owner is *not* that of a joint venture as defined by the director.

The definition of subsidiary requires that a parent own, directly or indirectly:

- (1) more than half of the entity and control the entity; *or*
- (2) half of the entity and control the entity; *or*
- (3) 50 percent of a 50-50 joint venture and have equal control and veto power over the entity; *or*
- (4) less than half of the entity, but in fact controls the entity.

See 8 C.F.R. § 214.2(l)(1)(ii)(K).

The director found that the U.S. and foreign entities met none of the above criteria. The AAO will examine the relationship between the U.S. entity and the alleged foreign parent under each of the above criteria in order to demonstrate the manner in which the petitioner's relationship with the foreign entity fails to qualify under the regulations.

First, as correctly concluded by the director, the foreign entity does not own more than half of the U.S. entity and control the U.S. entity. It is undisputed that at the time of the filing of the petition, the U.S. entity was equally owned by two individuals, namely, Southern Trading Import & Export Co. Ltd. (Southern) and Meitac International Co., Ltd. (Meitac). This fact is confirmed by counsel in the initial petition, in the response to the request for evidence, in the appeal brief, and in the declaration of the U.S. entity's general manager which was submitted with the appeal. Consequently, it is evident that that the foreign entity does not own more than half of the entity and control the entity.

Second, although the foreign entity does in fact own half of the U.S. entity, it does not control the entity. This fact is confirmed by the declaration of the U.S. entity's general manager, dated June 26, 2003. In this declaration, the general manager states that Southern and Meitac, the two parent corporations, "*have equal control and veto power over the operation of [the U.S. entity].*" In addition, no voting agreements or other such documents were submitted which would challenge the validity of the manager's claim that control is shared equally. Therefore, although the foreign entity does in fact own half of the U.S. entity, it does not control the entity.

Third, the petitioner has not proven that a qualifying relationship exists via the foreign entity's direct or indirect ownership of 50 percent of a 50-50 joint venture with equal control and veto power over the entity as set forth under 8 C.F.R. § 214.2(l)(1)(ii)(K).

On appeal, counsel states that the relationship is not that of a joint venture as defined by the director in the denial. The AAO notes some confusion on the part of counsel with regard to this statement. In the denial, the director concluded that although counsel alluded to the term "joint venture" in his response to the request for evidence, the evidence did not support a finding that the foreign entity owned a 50 percent interest in a 50-50 joint venture and had equal control and veto power with Meitac. A joint venture, the director stated, is "a partnership between organizations in the joint prosecution of a particular transaction for mutual profit."² The AAO notes, however, that neither the Act nor regulation provides a definition of the phrase "joint venture." However, the Commissioner has applied a broad definition of joint venture in a prior decision. The decision in *Matter of Hughes* states that a joint venture is "a business enterprise in which two or more economic entities from different countries participate on a permanent basis." 18 I&N Dec. at 289 (quoting a definition from Endle J. Kolde, *International Business Enterprise* (Prentice Hall, 1973)).

The director determined that the record was devoid of evidence suggesting that the business relationship between Southern and Meitac was that of a joint venture. On appeal, counsel states that Southern and Meitac are engaged in a continuing business through the U.S. entity, and specifically states, on page three of the appeal brief, that their relationship is *not* a joint venture as defined by the director. Although counsel's allegation, on its face, appears to argue that a joint venture does not exist, the AAO has determined that counsel's objection is with regard to the definition of "joint venture" relied upon by the director in the denial, and not an admission that a joint venture does not exist.

In reviewing the evidence for compliance with the definition of "joint venture," the AAO will look at the evidence contained in the record. 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 corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also 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. 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*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner failed to discuss and has not disclosed all agreements between the two parent companies relating to the voting of shares, management and direction of the subsidiary, and other factors which would

² *Black's Law Dictionary* 753 (5th Ed. 1979).

affect control over the subsidiary joint venture as required by *Matter of Siemens*. The record contains stock certificates and meeting minutes of the shareholders which affirm the 50-50 ownership of the U.S. petitioner by the foreign entity and Meitac.³ However, as stated above, ownership is but one of two essential factors that needs to be established in order to demonstrate the existence of a qualifying relationship. In this matter, the petitioner has failed to provide any voting agreements or agreements pertaining to the management of the company which would establish that the foreign entity exercises the crucial element of control and veto power over the U.S. petitioner. The only other document attesting to the relationship and the element of control is the statement of the general manager of the petitioner, dated May 2, 2003, which states that “[w]e respectfully suggest that the present corporations are both in control of the U.S. subsidiary as 50% ownership is sufficient evidence of control in accordance with INS regulations per ‘In re Siemens Medical Center, Inc. . . .’” As stated above, however, the decision in *Matter of Siemens* requires disclosure of all relevant agreements establishing control. Since no documentation or agreements pertaining to this factor have been submitted, the AAO is unable to conclude that the foreign entity exercises both ownership *and* control over the U.S. petitioner in this matter. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As a result, the general manager’s assertion that control exists is not sufficient to warrant approval of the petition.

Although the U.S. petitioner has established that it is owned by two corporations through equal 50 percent ownership interests, it has failed to submit any evidence pertaining to the element of control. As described in *Matter of Siemens*, the joint venture parent company must have the power to prevent action by the subsidiary company through exercise of its veto power due to the ownership and control of 50 percent of the voting shares. See *Matter of Siemens*, 19 I&N Dec. at 364. Without disclosure of all relevant voting and other management agreements, this factor cannot be ascertained.

Finally, the petitioner has not shown that the foreign entity owns less than half of the U.S. entity but controls the entity. As stated above, it is undisputed that the foreign entity shares equal ownership and control interests in the U.S. entity with Meitac. As a result, the petitioner has not established that it meets the criteria for a qualifying subsidiary relationship under 8 C.F.R. § 214.2(l)(1)(ii)(K).

Based on the evidence presented, it is concluded that the U.S. entity was not a qualifying subsidiary of the foreign entity as of the filing date of this petition, and thus did not have a qualifying relationship as required by the regulations.

Beyond the decision of the director, the AAO notes an additional issue not directly addressed prior to adjudication. First, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act. Specifically, the petitioner has not established that the beneficiary's subordinates, namely, three sales clerks and a warehouseman, are

³ The meeting minutes, which of the documents submitted were the most likely to contain details regarding voting of shares and thus control of the company, appear to have been altered. Specifically, as large gaps appear in the document and as some pages do not appear to be part of the same document, the AAO is left to question the reliability of this evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

supervisory, professional, or managerial. Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. See § 101(a)(44)(A)(ii) of the Act. For this additional reason, the petition may 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. 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.