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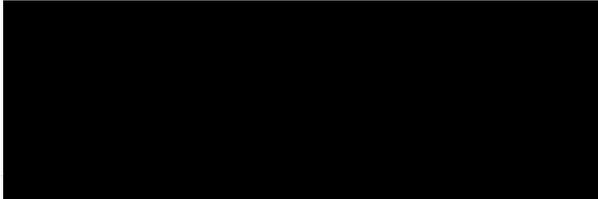


U.S. Citizenship  
and Immigration  
Services

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APR 07 2005



File: WAC 03 227 53476 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)

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 filed this nonimmigrant petition seeking to employ the beneficiary 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 petitioner is a corporation organized in the State of California that claims to be engaged in provision of telecommunications services. The petitioner claims that it is the affiliate or subsidiary of [REDACTED] located in Makati City, Philippines. The petitioner seeks to employ the beneficiary as vice president, operations and finance, at its new office in the United States.

The director denied the petition concluding that the petitioner did not establish a qualifying relationship between the United States entity and the foreign entity. Specifically, the director noted that the petitioner had not established that the foreign entity is the petitioner's majority shareholder or that it has controlling authority over the United States entity.

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, counsel for the petitioner asserts two important documents were inadvertently not submitted previously and contends that this evidence conclusively establishes the qualifying relationship between the United States petitioner and the foreign entity. Counsel submits a brief and the additional documentation in support of the appeal.

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.
- (v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to 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 involves executive or managerial authority over the new operation; and
  - (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 (1)(1)(ii)(B) or (C) of this section supported by information regarding:
    - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
    - (2) 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
    - (3) The organizational structure of the foreign entity.

The issue in the present proceeding is whether the beneficiary's foreign employer and the U.S. entity are qualifying organizations as required in the regulation at 8 C.F.R. § 214.2(1)(3)(i).

The pertinent regulations at 8 C.F.R. § 214.2(1)(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[.]

\* \* \*

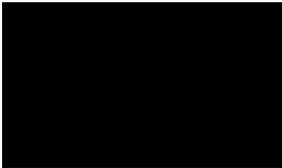
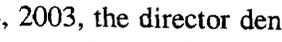
- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operating division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or 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.

In the initial petition, the petitioner stated that it is the affiliate of the foreign entity and indicated that the foreign entity "presently owns 300,000 shares of stock" in the petitioner. In an attached letter dated July 22, 2003, the petitioner stated that the foreign entity "recently finalized its negotiations by investing a great deal in telecommunications with a U.S.-based company known as [the petitioning company]," and further stated that the foreign entity's ownership of 300,000 shares of stock in the petitioner makes the foreign entity "a major controlling shareholder. . . thereby giving the foreign business entity the right to earn a seat in the U.S. company's Board of Directors, including a key position in its corporate hierarchy."

In support of the petition, the petitioner submitted the U.S. entity's articles of incorporation, which indicate that the petitioner is authorized to issue one million shares of common stock; its corporate by-laws; and a copy of one stock certificate, number eight, indicating that 300,000 shares of the petitioner's common stock were issued to the foreign entity on May 15, 2003. The stock certificate indicates on its face that the petitioner is authorized to issue one million shares. The petitioner also submitted evidence that the foreign entity paid

the U.S. entity a total of \$300,000 for the shares by two separate wire transfers, dated May 19 and May 27, 2003.

On August 21, 2003, the director requested additional evidence. In part, the director requested the petitioner's stock transfer ledger. In a response dated September 24, 2003, the petitioner submitted: (1) the U.S. company's stock transfer ledger indicating that nine certificates and a total of one million shares of stock had been issued; (2) photocopies of the corresponding stock certificates numbered one through nine; and (3) the petitioner's Minutes of Organizational Meeting dated October 15, 2002, which reflects the initial issuance of 100,000 shares of stock to its directors; and (4) a document entitled "Unanimous Written Consent to Action Without Meeting" dated July 16, 2003, for the petitioner. This document reflects the election of the beneficiary as the petitioner's treasurer, the cancellation of stock certificate number three, and issuance of certificates numbers four through nine, resulting in the following ownership:<sup>1</sup>

<u>Shareholders</u>	<u>Number of Shares</u>
	325,000
	325,000
	300,000
	50,000
TOTAL	<u>1,000,000</u>

On October 14, 2003, the director denied the petition. The director noted that the foreign entity only owns 300,000 stocks out of a total of one million shares issued by the petitioner. Accordingly, the director concluded that, as the beneficiary's foreign employer is not the majority shareholder and does not have controlling authority over the petitioning entity, the petitioner failed to establish that it has a qualifying relationship with the foreign entity as required by the regulation at 8 C.F.R. § 214.2(1)(3)(i).

On appeal, counsel for the petitioner asserts that additional evidence is available, but was inadvertently not submitted, to establish that the foreign entity does have a controlling interest in the petitioner sufficient to establish a qualifying relationship. This additional evidence includes: (1) a Memorandum of Agreement between the petitioner and the foreign entity, entered into on May 14, 2003; and (2) excerpts from a Special Meeting of the Board of Directors of the foreign entity, held on May 12, 2003. Counsel notes that "these documents are the precursor of all final negotiated arrangements between the two business entities and were in fact available and existing even long before the filing of this petition." Counsel further states that "the Board Resolution and the Memorandum of Agreement (MOA) would clearly establish that the foreign entity is and shall be a major stockholder of the U.S. based corporation as in fact [the foreign entity] is to own a total of 500,000 shares of the one million shares of stocks of [the petitioner]."

<sup>1</sup> As noted by counsel on appeal, the director's decision contains a mathematical error with respect to the number of shares of stock owned  director erroneously stated that these individuals each hold 350,000, rather than 325,000, shares.

The foreign entity's May 12, 2003 board resolution indicates that the directors unanimously approved a resolution to acquire 500,000 shares of the petitioner's stock according to the following schedule: (1) 300,000 shares to be acquired on or before May 2003; (2) 100,000 shares to be acquired within six months after May 2003; and (3) 100,000 shares to be acquired within six months thereafter. The submitted Memorandum of Agreement also states that the petitioner and the foreign entity agree that the foreign entity will acquire 500,000 shares of the petitioner's stock according to the schedule resolved by the foreign entity's directors. The agreement includes the following terms, which are emphasized by counsel on appeal:

3. The [petitioning company] will allocate and reserve at least three (3) seats in its Board of Directors as well as major key positions in its corporate stratum for a representative of [the foreign entity].
4. The [foreign entity] shall have the right to exercise operational control and supervision over the business affairs of [the petitioning company];
5. The [U.S. and foreign entities] have mutually, freely and voluntarily agreed to bind themselves under the terms of this Agreement and consider the terms hereof as immediately effective and executory upon signing.

Referring to this agreement, counsel states

Fully cognizant of the terms thereof, it is for this reason that, . . .the petitioner's initial letter has categorically stated that [the foreign company] is a major controlling shareholder in [the petitioner] thereby giving the foreign business entity the right to earn a seat in the U.S. company's Board of Directors. That [the foreign entity's] acquisition of the additional 200,000 shares of [the petitioner] has yet to be completed on a staggered basis (yet within a specified period) is of no moment considering that the contracting parties have at the onset already established their real intent of making the foreign business entity a major controlling stockholder of, with a controlling interest in the US-based company. . . .

It is not, therefore, entirely accurate to presume nor conclude that the foreign entity is not a majority shareholder and does not have controlling authority over the petitioning entity. Based on available documents and information, it can be deduced therefore that the business agreement could have been to make the [the petitioner] a subsidiary of [the foreign entity.]

\* \* \*

[I]t can be seen that [the foreign entity] owns, directly or indirectly, half of the petitioner thereby acquiring control over it. Evidently, the beneficiary's *foreign employer IS the majority shareholder and HAS the controlling authority* over the petitioning entity, and consequently, fulfilled the qualifying relationship requirements pursuant to 8 CFR § 214.2(1)(1)(ii). (Emphasis in original.)

Counsel further asserts that pursuant to the regulation at 8 C.F.R. § 214.2(l)(8)(i), the director was bound by regulation to issued a notice of intent to deny the petition and allow the petitioner 30 days in which to submit a response before making an adverse decision on the basis of evidence not submitted by the petitioner. Counsel notes "had the Service issued another NOA/RFE (as it does in other cases), thereby affording the petitioner an opportunity to further expound on the evidence presented, the additional documentary evidence presented herewith could have been submitted without delay."

Upon review, counsel's assertions and the submitted documentation do not establish that the petitioner and the foreign entity possess a qualifying relationship. 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 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 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, Inc.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, Citizenship and Immigration Service (CIS) is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 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. In this case, the petitioner failed to submit the required initial evidence to establish a qualifying relationship with the foreign entity, so the director reasonably requested additional documentation, namely the petitioner's stock transfer ledger. The petitioner chose to submit its stock transfer ledger, copies of all of its stock transfer certificates, the minutes of its organizational meeting, and the unanimous written consent of its directors dated July 15, 2003. Counsel claims that the petitioner inadvertently failed to include the memorandum of agreement and the foreign company's board resolution from May 2003 in its previous submissions, and requests that these documents be considered on appeal.

In the instant matter, the petitioner submitted sufficient evidence in response to the request for evidence to establish that, as of the date of filing, the foreign entity had paid for and owned 30 percent of the petitioner's issued and outstanding stock. Since the foreign entity did not even own a plurality, much less a majority of the petitioner's stock, and as there was no documentation to support a finding that the foreign entity in fact

controlled the U.S. entity, the director reasonably concluded that there was no qualifying relationship between the two entities and denied the petition. The petitioner submitted no evidence prior to the director's decision that would have suggested the existence of an agreement between the companies, now presented for the first time on appeal. Therefore, counsel's claim that the director was obligated to issue a second request for evidence or a notice of intent to deny the petition prior to issuing a decision is not persuasive. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The AAO has nevertheless considered counsel's claim that the previous omission of the evidence was merely an oversight on the part of the petitioner and reviewed the evidence submitted for the first time on appeal. Upon review of the additional documentation, the petitioner has not established a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(3)(i). As noted above, the petitioner submitted evidence that the foreign company's directors agreed to purchase a total of 500,000 shares of the petitioner's one million shares of stock, and evidence purported to demonstrate that the petitioner granted the foreign entity the right to purchase 500,000 shares of stock, along with the right to exercise operational control of the entity. The agreement appears to indicate that such control would be effective immediately upon signing, perhaps even before any stock purchase took place.

There are two discrepancies in the record which prevent the AAO from finding that the evidence submitted establishes the claimed ownership and control of the United States entity. First, it has been established that the petitioner is authorized to issue one million shares of common stock and that all shares had been issued as of the date of filing. It is noted that most of the petitioner's stock, certificates numbered four through seven, totaling 580,000 shares, was issued to parties *other than* the foreign entity on July 16, 2003, two months subsequent to the date of the memorandum of agreement. The petitioner has not explained how the foreign entity would acquire the additional 200,000 shares of stock given the fact that all of the U.S. company's stock has already been issued.

Second, while the petitioner submitted evidence that the foreign entity agreed to the stock purchase and provided a copy of the memorandum of agreement signed by representatives of both companies, there is no evidence that the petitioner's board of directors has acknowledged such agreement. If one of the petitioner's directors actually authorized the foreign company to "exercise operational control and supervision over the business affairs" of the United States company as of May 13, 2003, it is reasonable to expect that the petitioner's board of directors had to consent prior to such agreement. The record contains no meeting minutes, resolutions or other documents acknowledging the petitioner's proposed participation in the agreement. The petitioner's Unanimous Written Consent to Action Without Meeting, dated July 16, 2003, acknowledges the issuance of six stock certificates that occurred in November 2002, May 2003 and July 2003, confirms that all of the corporation's authorized stock has been issued, and records the election of the beneficiary as a director of the company. This document does not acknowledge the memorandum of agreement whereby the petitioner purportedly agreed to grant the foreign entity control of the United States business. The absence of evidence establishing that the petitioner's board of directors agreed to transfer

control of the company to the foreign entity raises serious doubts regarding the validity of the memorandum of agreement submitted for the first time on appeal.

Collectively, these discrepancies and omissions undermine the probative value of the evidence submitted on appeal and counsel's claim that the foreign entity in fact controls the petitioner. 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). The petitioner has not submitted probative evidence to overcome the deficiencies noted in the director's decision with respect to its qualifying relationship with the foreign entity. The AAO concurs that at the time of filing, the foreign entity maintained only 30 percent ownership in the petitioner and did not, in fact, control the entity. Thus, the evidence of record, considered in aggregate, does not meet the petitioner's burden of showing that it is a qualifying organization as required by 8 C.F.R. § 214.2(i)(3)(i). For this 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.