

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

identifying data deleted to
prevent unauthorized
invasion of personal privacy



DM

FEB 07 2005

FILE: WAC 01 185 54881 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:

Beneficiary:

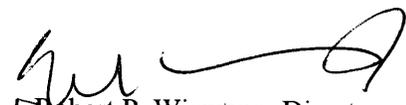
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 appeal will be dismissed.

The petitioner is described as being engaged in the import, export and sale of agricultural products and equipment for the dairy, cattle and farming industries. It seeks authorization to amend and extend the employment of the beneficiary temporarily in the United States as an export administrator. The director determined that the petitioner had not established that a qualifying relationship exists between the foreign entity and the U.S. entity. The director determined that the U.S. entity is not a qualifying organization and has not been doing business as defined.

On appeal, counsel contends the only substantive change in the parent/affiliate relationship since the date of the original approved petition is the increase in legal ownership by the majority owner. Counsel asserts that the U.S. petitioner is not a start-up and that there is no requirement for funds transfer from Mexico to the U.S. company.

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.

At issue in this proceeding is whether a qualifying relationship exists between the petitioning company and the claimed parent company.

Bureau regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) define the term "qualifying organization" as follows:

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.

8 C.F.R. § 214.2(l)(1)(ii)(I) states:

Parent means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. § 214.2(l)(1)(ii)(J) states:

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

8 C.F.R. § 214.2(l)(1)(ii)(K) states:

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.

8 C.F.R. §214.2(l)(1)(ii)(L) states, in pertinent part:

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, [REDACTED] located in Calexico, California, claims to be the affiliate of [REDACTED], located in Mexicali, Mexico. The petitioner explained that [REDACTED] acquired all the assets, subject to the liabilities, of [REDACTED], a California Corporation. The petitioner claimed it maintained the existing management and employees of Delta Commodities, Inc. as well as its customers, inventory, and work in progress.

In support of this claim, the petitioner submitted an agreement of purchase and sale of assets that was dated October 31, 2000 which the petitioner states demonstrates the purchase of [REDACTED] by [REDACTED]. The Form I-129 indicated that both the U.S company, [REDACTED] and the foreign entity are owned by the same group of owners:

- [REDACTED] 60%
- [REDACTED] 20%
- [REDACTED] 10%
- [REDACTED] 10%

The director issued a request for evidence requesting the following information to establish that the foreign entity is a valid business entity:

- Photographs of Foreign Company: Color photographs of business premise inside and outside. Also include company logos or signs. Provide address, directions and telephone numbers for each facility.
- Business License
- Sales Invoices: Submit legible copies of the foreign company's sales invoices and/or sales contracts to identify the gross sales amount as reported on the income and expenses statement.
- Telephone directory listing with translation

The director also requested the following documents pertaining to the United States business:

- Proof of Stock Purchase: Submit evidence to show that the foreign company has paid for the U.S. entity. The evidence should include copies of original wire transfers from the parent company. Also cancelled checks, deposit receipts, etc. detailing monetary amounts for the stock purchases should be submitted.
- Stock Certificates: Submit copies of all the U.S. company's stock certificates issued to the present date clearly indicating the name of each shareholder.
- Stock Ledger: Submit copies of the U.S. company's stock ledger showing all stock certificates issued to the present date including total shares sold, names of shareholders, and purchase price.
- Detailed List of Owners: Submit a detailed list of the owners of the U.S. company and what percentages they own. List names, corporate and specific government affiliation, and percentages of ownership.

Doing Business: Submit the following evidence to establish that the U.S. company is doing business.

- Sales tax: Provide a copy of the U.S. company's Sales and Use Tax Returns
- Business Licenses
- Seller Permit
- Telephone Directory Listing
- Publications
- Memberships
- Main Sales Invoices
- Shippers Export Declaration
- Customs Forms

Physical Premises: Submit the following evidence to establish that a physical premise has been secured for the U.S. company.

- Floor Plan
- Photographs of the U.S. Business Premise
- Business Hours
- Phone number

- Lease Agreement
- Insurance
- Occupancy Permit

Additionally, the director requested evidence that the beneficiary has been and will be performing the duties of a manager or executive within the U.S. company.

On September 25, 2001, the petitioner responded to the request for evidence. The petitioner provided color photographs of a company called [REDACTED], business registration documents for [REDACTED] and business invoices from [REDACTED]. Additionally, the petitioner submitted documents regarding the U.S. petitioner's majority owner's E-2 treaty investor application and approval notice.

Regarding the U.S. entity, the petitioner submitted the following: the petitioner's articles of incorporation which were dated July 10, 2000, the Form SS-4 application for employer identification number, and a bank deposit slip that indicated \$10,000 were deposited into [REDACTED]'s U.S. bank account on October 26, 2000. The petitioner submitted an additional bank statement showing an account balance of \$77,490 dated November 30, 2000. The petitioner also submitted a statement of cash flow for [REDACTED] Inc. The petitioner submitted [REDACTED]'s business plan. Additionally, the petitioner submitted the operating agreement for [REDACTED] with an attachment that indicated the following membership interests:

Francisco C. Fuentes	60%
Ma Consuelo Arestegui de Fuentes	20%
Carlos Javier Fuentes	10%
Francisco Jose Fuentes	10%

The petitioner submitted an untitled organizational chart for the U.S. company which indicates that the beneficiary's position is that of export sales and is supervised by the sales manager. Additionally the petitioner provided a lease agreement which indicates the assignment of the lease from [REDACTED] Inc. to [REDACTED]. The petitioner provided the Form 1120 Corporate Income Tax Return for [REDACTED] for the tax year 1999. This tax return indicated that [REDACTED] owned 51% of the common stock.

Additionally, the petitioner provided copies of photographs which were vaguely labeled "offices." The petitioner provided an additional statement regarding the beneficiary's executive capacity. This statement included a U.S. business organizational chart which indicated that the beneficiary works in the logistics department but does not provide the specific position title. Additionally, the petitioner provided payroll information for [REDACTED] from the third and fourth quarter of 2000 as well as payroll documentation for [REDACTED] for the first and second quarter of 2001.

The petitioner also provided the city business license, seller's license, telephone book listing, numerous invoices (dated August and September 2001) and numerous customs forms 7525-V (dated September 2001) for [REDACTED]. Also included were photographs of both the outside and inside of an office labeled [REDACTED]. The petitioner included an industrial lease for an industrial building of 28,000 square feet leased to [REDACTED] Inc. as well as blueprints for the space leased.

On March 27, 2002, the director issued a notice denying the petition. The director stated that part of the information requested of the petitioner "was the transfer of funds from the foreign company to establish the relationship between the U.S. entity and the foreign company." The director stated that the petitioner did not respond to this request and found that pertinent information was not submitted to prove that the foreign entity has ownership and control over the U.S. entity. The director determined that the evidence submitted is insufficient to determine that there is a qualifying relationship between the U.S. entity and the foreign entity.

The director also requested color photographs of the foreign and U.S. entity showing both the inside and outside of all factory, production and office spaces with equipment, merchandise, products and employees, clearly visible. The petitioner was to include any logos, emblems or signs displayed. The director determined that the petitioner failed to identify the existence of the U.S. entity and the foreign company. The director determined that the petitioner had not established that the U.S. entity was doing business.

On appeal, counsel explains that the petitioner is not a start-up and it is the successor in interest to a long-established going concern therefore there is no requirement to demonstrate a funds transfer from Mexico to the United States. The AAO agrees with counsel's reasoning that it may not be necessary for the petitioner to demonstrate a funds transfer from Mexico to the U.S. entity. However, as stated in CIS regulations, the petitioner must demonstrate there is a qualifying relationship between the petitioner and the foreign entity.

On appeal, counsel asserts that CIS was erroneous in their application of regulations and service policy. Counsel asserts that [REDACTED] is the affiliate of [REDACTED]. Additionally, counsel asserts "both companies are owned and controlled by Francisco C. Fuentes, and in both instances Mr. [REDACTED] owns 80 percent of the equity and is in charge of all day-to-day management and operations. However, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, the petitioner submits an affidavit from [REDACTED]. Section 1 of this affidavit states that Mr. [REDACTED] owns 80 percent of the foreign entity. Additionally, this affidavit states that the foreign entity, [REDACTED], is a holding company for a number of operating companies. In Section 5, Mr. [REDACTED] states "My wife and I own 80 percent of the membership interest in the LLC." Section 8 of the affidavit states "I own 80 percent of the Mexican parent company and 80 percent of the U.S. affiliate." 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).

Additionally, counsel states that "[t]his company and the predecessor and affiliate in Mexico have been granted petitions for International Executives for the past 9 years. The California Service Center has volumes on file regarding this company." Counsel also states that the petitioner bases this appeal on the instant record of proceeding "and the books, records, and files maintained by the service; the prior petition filed on behalf of the beneficiary" Counsel lists other receipt numbers for files at the California Service Center. However, it is worth emphasizing that that each petition filing is a separate proceeding with a

separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). If a director requests additional evidence that the petitioner may have submitted in conjunction with a separate nonimmigrant petition filing, the petitioner is, nevertheless, obligated to submit the requested evidence, as the record of the nonimmigrant proceeding is not combined with other records of nonimmigrant proceedings.

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 nonimmigrant visa classification. *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 (BIA 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* at 595.

The regulation at 8 C.F.R. § 214.2(l)(3)(viii) specifically allows the director to request such other evidence as the director may deem necessary. While the petitioner has submitted the operating agreement for the U.S. company which includes a listing of membership interests, the petitioner has not submitted any documentation evidencing the ownership of the foreign company. Therefore, the petitioner has not established that the foreign company and U.S. company share common ownership so that they may qualify as affiliates. Counsel claims that because one person owns 60 percent of both companies that the two companies are affiliates. Additionally, the affidavit by the majority owner of the petitioner contains inconsistencies regarding his percentage of ownership of both the U.S. and foreign entities. For this reason, the petition may not be approved.

Although the director determined that the U.S entity has not been doing business as defined, upon review of the record, the AAO finds the petitioner has provided sufficient evidence to demonstrate that the U.S. entity has been doing business as defined by the regulations. The petitioner has provided federal and state tax returns as well as customs documents and sales invoices. Additionally, the petitioner provided leases to demonstrate that it has sufficient business premises to operate. However, because the petitioner has not provided sufficient evidence to determine whether there is a qualifying relationship between the foreign and U.S. entity, this issue need not be addressed further.

Beyond the decision of the director, the petitioner provided insufficient evidence to determine whether the beneficiary will be employed primarily in a managerial or executive capacity. The Form I-129 indicates that the beneficiary has been and will be employed in the position of export administrator. The letter from the petitioner attached to the petition states that the export administrator is a key managerial position in the export services department. However, the petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. Additionally, the petitioner has provided more than one organizational chart for the U.S. entity that indicates a different position for the beneficiary. 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 shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary has been or will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. The petitioner admits "this department has not progressed to a point where we require additional employees to work under the supervision of [the beneficiary]." Based on the evidence submitted, it cannot be found that the beneficiary has been employed in a primarily executive or managerial capacity. For this additional reason, this 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.

ORDER: The appeal is dismissed.