

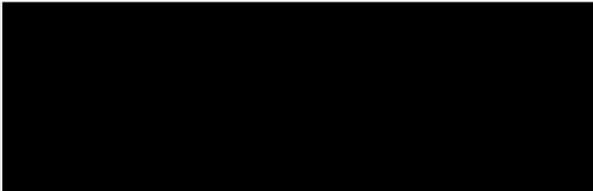
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services



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File: WAC 08 216 50731 Office: CALIFORNIA SERVICE CENTER Date:

AUG 11 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant petition and 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, a South Dakota corporation, is engaged in direct sales of jewelry and fashion accessories. It claims to be an affiliate of Fifth Avenue Collection, Ltd., located in Moose Jaw, Canada. The petitioner seeks to employ the beneficiary in the position of sales manager/field trainer.

The director denied the petition on two separate and independent grounds. Specifically, the director determined that the petitioner had failed to establish: (1) that the U.S. company and the foreign entity have a qualifying relationship; and (2) that the petitioner has secured physical premises to house the U.S. office.

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 asserts that it has maintained the same office premises in the United States since 1992, and submits additional evidence in support of the claimed affiliate relationship between the petitioner and 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 first issue to be addressed is whether the petitioner established that the U.S. company and the foreign entity have a qualifying relationship. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." See generally section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

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[.]

* * *

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

* * *

(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 filed the Form I-129, Petition for a Nonimmigrant Worker, on August 1, 2008. The petitioner stated on Form I-129 that it is an affiliate of Fifth Avenue Collection, Ltd., a Canadian corporation.

In support of the petition, the petitioner submitted a chart depicting the ownership of both companies. The chart indicates that the ownership of the U.S. company is as follows:

██████████ 5,332 common shares
██████████ 2,666 common shares

The company ownership chart indicates that Fifth Avenue Collection Ltd. has the following ownership:

██████████ 2,000 common shares
██████████ 1,000 common shares
100 Class A Voting Preference
294,999 Class B Voting Preference

The chart indicates that ██████████ is owned by the ██████████, which in turn is owned by ██████████. ██████████ is listed as the sole owner of ██████████.

The chart indicates that ██████████ is owned by the ██████████ which in turn is owned by ██████████, ██████████ and ██████████ are listed as the joint owners of ██████████.

The petitioner submitted the articles of incorporation for Fifth Avenue Collection Ltd. and articles of amendment reflecting the company's name change from ██████████. The articles of incorporation indicate that the company is authorized to issue unlimited common shares and unlimited Class A Preference Shares. The petitioner also provided a copy of the U.S. company's articles of incorporation, which indicate that the company was established in South Dakota in 1991 and is authorized to issue 100,000 shares of common stock.

The director issued a request for additional evidence (RFE) on September 25, 2008, in which she requested, inter alia, additional evidence to establish the ownership of the foreign and U.S. companies. Specifically, the director requested copies of stock certificates, stock ledgers, minutes of relevant board meetings addressing stock ownership, copies of annual reports, and proof of stock purchase.

In response, the petitioner submitted the following evidence:

- A copy of the 2007 Form MG-14269, Annual Return of Information, filed by Fifth Avenue Collection Ltd. with the Manitoba provincial government. The information return identifies the company's shareholders as ██████████ and ██████████ Ltd., with the same stock ownership indicated above.

- A copy of the 2008 Form MG-14269, Annual Return of Information, filed by [REDACTED] Manitoba Ltd., which identifies [REDACTED] as the sole company shareholder.
- A copy of the 2007 Form MG-14269, Annual Return of Information, filed by [REDACTED] Manitoba, Ltd. which identifies the shareholders as [REDACTED] (583,433 Pref A shares) and [REDACTED] (583,233 Pref A shares).
- Copies of the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for the 2006 and 2007 tax years. The corporate tax returns indicate at Schedule K that the company has two share holders, and identify [REDACTED] as the controlling shareholder with 66^{2/3}% of the shares

The petitioner also resubmitted the company ownership chart submitted at the time of filing, and copies of both companies' articles of incorporation.

The director denied the petition on December 2, 2008, concluding that the petitioner failed to establish that the petitioner and the foreign entity have a qualifying relationship. In denying the petition, the director observed that "[t]he petitioner has not submitted the corporate stock certificate, ledger, stock certificate registry, corporate bylaws and the minutes of relevant annual shareholder meetings or other evidence." The director found that the evidence submitted was insufficient to establish the elements of common ownership and control between the U.S. and Canadian companies.

On appeal, the petitioner submits additional evidence relevant to the ownership and control of the U.S. company, including:

- Minutes of the First Meeting of Directors of the U.S. company, dated April 30, 1991, which indicates that the petitioner's stock was subscribed as follows: [REDACTED] 2,666 shares; [REDACTED] 2,666 shares; and [REDACTED] 2,666 shares.
- Stock Purchase Agreement made on February 24, 2004, whereby [REDACTED] sold his 2,666 shares in the petitioning company to [REDACTED]
- Copies of the petitioner's stock certificates #1-4, indicating that [REDACTED] holds a total of 5332 shares (certificates #1 and #4) and [REDACTED] holds 2,666 shares (certificate #2).
- A copy of the petitioner's stock transfer ledger, which indicates that original issuance of stock to the three shareholders in April 1991 and the subsequent transfer of shares from [REDACTED] to [REDACTED] in 1994.

The petitioner also explains and documents the methods by which the petitioner's individual shareholders paid for their shares in the company.

Upon review, the petitioner has not established that the petitioner and the foreign entity have 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 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*, 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.*, *supra*. Without full disclosure of all relevant documents, USCIS 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. 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.

Upon review of the record, the petitioner has established that the U.S. entity is owned by two individuals, [REDACTED] and [REDACTED] with [REDACTED] holding the majority and controlling interest in the U.S. entity. Therefore, the factual determination to be made is whether [REDACTED] also owns and controls Fifth Avenue Collection, Ltd.

If one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the regulatory definition even if there are multiple owners. In *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Acting Assoc. Comm. 1981) it was determined that "[w]here there is a high percentage of ownership and common management between two companies, either directly or indirectly or through a third entity, those companies are 'affiliated' within the meaning of that term as used in section 101(a)(15)(L) of the Act." *Id.* at 633. In the *Tessel* decision, the beneficiary solely owned 93% of the foreign corporation and 60% of the petitioning organization, thereby establishing a "high percentage of common ownership and common management"

The record as presently constituted does not contain sufficient evidence to establish the ownership and control of Fifth Avenue Collection, Ltd. The record shows that [REDACTED], a company that is wholly owned by [REDACTED] owns 2,000 common shares in Fifth Avenue Collection, Ltd., while [REDACTED]

██████████, a company owned by ██████████ and ██████████, owns 1,000 common shares, 100 Class A Voting Preference shares, and 294,999 Class B Voting Preference shares.

Although the petitioner has submitted relevant evidence on appeal with the respect to the ownership and control of the U.S. company, the petitioner has not submitted copies of stock certificates, a stock transfer ledger, by-laws, minutes of the directors meetings, or other documents that would assist in determining who exercises control over the foreign entity. None of the submitted documents identify the significance of "common" versus Class A or Class B voting preference shares and the resulting impact upon control of Fifth Avenue Collection, Ltd. Therefore the AAO cannot assume that ██████████ controls the company based on her indirect ownership of the majority of the common shares issued. As noted above, without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control. 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)).

Based on the foregoing discussion, the petitioner has not established that the petitioner has a qualifying relationship with the beneficiary's foreign employer. For this reason, the appeal will be dismissed.

The second issue to be addressed is whether the petitioner established that it has sufficient premises to house the U.S. office. In denying the petition, the director cited to the regulations governing "new office" petitions at 8 C.F.R. § 214.2(l)(3)(v).

Upon review, the director's determination will be withdrawn. The evidence of record establishes that the petitioning company was incorporated in South Dakota in 1991 and that it has been leasing its current premises since the early 1990s. Further, with respect to this issue, the corporate tax returns submitted in response to the RFE demonstrate that the U.S. company has been actively doing business for more than one year and is not a "new office" as defined at 8 C.F.R. § 214.2(l)(1)(ii)(F). Accordingly, all references made by the director to the petitioner as a new office shall also be withdrawn.

Beyond the decision of the director, a remaining issue is whether the petitioner established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity on a full-time basis for one continuous year within the three years preceding the filing of the petition, as required by 8 C.F.R. § 214.2(l)(3)(iii) and (iv).

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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), defines the term "executive capacity" as 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 indicated on the Form I-129, Petition for a Nonimmigrant Worker, that the beneficiary has been employed by the foreign entity since January 1, 1990. Where asked to describe the beneficiary's duties for the last three years, the petitioner stated: "Field Training." In a letter dated July 17, 2008, the foreign entity's president stated:

[The beneficiary] has been with Fifth Avenue Collection Ltd. in Canada for the last sixteen years in marketing and sales. She has extensive training in product knowledge, sales techniques, interviewing prospective representatives, etc.

In a second letter, also dated July 17, 2008, the foreign entity's president further described the beneficiary's duties in Canada as the following:

Her duties include conduction of meetings and/or seminars in Sales Training and Leadership, setting and monitoring sales objectives, interviewing and hiring sales personnel and introducing sales programs and incentives. As such she has established an extensive sales force in Canada.

In the RFE issued on September 25, 2008, the director requested that the petitioner submit copies of the foreign entity's payroll records pertaining to the beneficiary for the year preceding the filing of the petition. The director also instructed the petitioner to submit: (1) a more detailed job description identifying the

beneficiary's specific duties and the percentage of time she devotes to each of the listed duties; (2) information regarding the total number of employees working at the foreign location; (3) a copy of the foreign entity's organizational chart clearly identifying the beneficiary's position and listing all employees who work under the beneficiary's supervision by name and job title; and (4) brief job descriptions for the beneficiary's subordinates.

In response to the director's request, the foreign entity submitted a letter dated October 27, 2008. The foreign entity stated that the beneficiary was hired on January 30, 1990 and has been a Sales Manager for the past fifteen years. The foreign entity indicated that the beneficiary "has extensive training in product knowledge, sales techniques, interviewing prospective representatives, etc."

The foreign entity attached a copy of the beneficiary's 2007 Canada Revenue Income Tax Form T4A, Statement of Pension, Retirement, Annuity and Other Income. The Form T4A indicates that the beneficiary received \$48,639.90 in "self-employed commissions," and \$5,244.02 in "other income" from the foreign entity.

The foreign entity stated that it has 65 employees in Canada as of October 31, 2008, and an "independent sales force" of 1,500 people. The petitioner re-submitted the above-mentioned company ownership chart for the organization rather than submitting the requested organizational chart depicting the staffing of the foreign entity.

The petitioner's response to the RFE also included a copy of the foreign entity's November 2008 publication, *Glitter*, which appears to be a monthly newsletter distributed to the company's independent jewelers/sales agents. The beneficiary is pictured in the publication in a section featuring "sales leaders," described as those who "receive generous commissions on the sales of the people they have introduced to the business," in addition to earnings from their personal sales. The beneficiary is one of 30 sales leaders pictured, and is identified as a "Sr. Sales Leader." It appears that all of the company's established jewelers are given incentives to recruit and sponsor new jewelers to grow the sales force.

When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

The evidence of record is insufficient to establish that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. Based on a review of the totality of the evidence submitted, it appears that, while the beneficiary may be responsible for recruiting and training new independent sales agents, she remains responsible for selling the company's products directly to customers. Although requested by the director, the petitioner has failed to provide a detailed position description establishing what portion of the beneficiary's time is allocated to any managerial or supervisory duties, and what portion is spent performing non-qualifying duties. Therefore, based on the minimal explanation in the record regarding the beneficiary's position with the foreign entity, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-

managerial administrative or operational duties. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). 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 AAO cannot determine whether the beneficiary performs duties beyond those of a lead salesperson. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, the fact that the beneficiary received payments from the foreign entity in the form of "self-employed commissions" rather than a salary or wage from the foreign entity raises questions as to whether she is included among the foreign entity's 65 employees, or among its 1,500-member "independent sales force." The petitioner has failed to submit an organizational chart depicting the staffing structure of the foreign entity, which further undermines the AAO's ability to determine whether the beneficiary's position is at a senior level within the organizational structure, or whether she is even considered an "employee" of the foreign entity. The record as presently constituted does not contain evidence that the beneficiary is a bona fide employee of the foreign entity, or that she has been employed by the foreign entity in a primarily managerial or executive capacity. For these additional reasons, the petition cannot be approved.

Finally, for similar reasons as those stated above, the petitioner has not established that the beneficiary will be employed by the U.S. entity in a primarily managerial or executive capacity. The petitioner evidently expects the beneficiary to perform duties in the United States comparable to those she has been performing in Canada, but has not provided a detailed description of her proposed duties, identified her proposed salary or wage, or indicated that she will be a direct employee of either the U.S. or foreign entity. If the beneficiary will continue to be self-employed and receive payments on a commission only basis, she is ineligible for this visa classification. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For this additional reason, the appeal will be dismissed.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion

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with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.