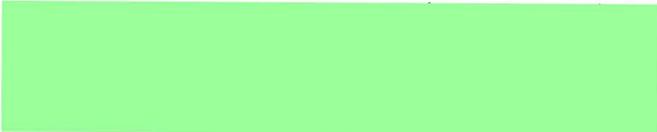




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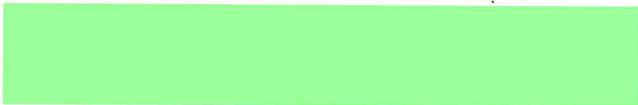


DATE: **APR 18 2013**

Office: CALIFORNIA SERVICE CENTER

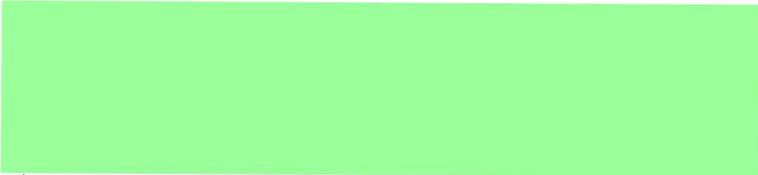
FILE: 

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:

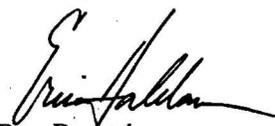


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The director granted the petitioner's subsequent motion to reconsider and affirmed her decision. 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 extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it is engaged in importation/exportation/wholesale. It claims to be a subsidiary of [REDACTED] located in the Philippines. The petitioner has employed the beneficiary as its President since July 2009 and now seeks to extend her L-1A status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that it has a qualifying relationship with the beneficiary's foreign employer. The petitioner subsequently filed a motion to reopen and reconsider. The director granted the motion and affirmed the previous decision. The director concluded that the evidence of record, including the evidence submitted on motion, did not establish that the foreign entity owns the U.S. entity.

On appeal, counsel for the petitioner asserts that the director erroneously determined that the foreign entity and petitioner do not have a parent-subsidiary relationship despite evidence to the contrary. The AAO observes that while counsel indicated on the Form I-290B, Notice of Appeal or Motion, that he would forward a brief and/or evidence to the AAO within 30 days of filing the appeal, the record reflects that neither counsel nor the petitioner submitted anything further. Accordingly, the record will be considered complete.

I. The Law

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 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.

II. The Issue on Appeal

The sole issue addressed by the director, is whether the petitioner established that it has a qualifying relationship with the beneficiary's foreign employer. 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).

A. Facts and Procedural History

The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, that it is a subsidiary of [REDACTED] (the "foreign entity"), located in Manila, Philippines.

The certificate of incorporation for [REDACTED] states that the company was formed on June 3, 1999. The shareholders listed are [REDACTED] with 1,000 shares, and [REDACTED] and [REDACTED] each with 375 shares of stock.

The petitioner also provided copies of its stock certificate no. 1 and articles of incorporation. The stock certificate indicates that the petitioner issued 1,000 shares to [REDACTED] on March 30, 2009. The articles of incorporation dated March 16, 2009 state that the company is authorized to issue 10,000 shares of stock.

The petitioner's initial evidence included a copy of its IRS Form 1120, U.S. Corporation Income Tax Return for 2010. The petitioner did not identify any foreign shareholder at Form 1120, Schedule K. Further, lines 22 and 23 of Schedule L, where the tax payer is required to report the value of the company's issued stock and any additional paid-in capital, were left blank.

The director issued a Request for Evidence (RFE), stating the petitioner had not established a qualifying relationship between the petitioner and the foreign entity. The director requested, *inter alia*, the following: meeting minutes from the U.S. company showing the stock shareholders; a detailed list of the owners of the U.S. entity, including the number and percentage of shares owned by each individual and par value of the shares; the stock ledger for the U.S. company showing all stock certificates issued to the present date, including total shares of stock sold, names of shareholders, and purchase price; evidence to show that the foreign entity paid for the U.S. entity's stock; and the U.S. company's notice of transaction showing the total offering amounts.

In response, the petitioner submitted minutes from its first meeting of directors, dated April 9, 2009; a notice of transaction from the California Commissioner of Corporations, dated March 30, 2009, showing the U.S.

company first sold stock valued at \$5,000 on March 16, 2009; a General Information Sheet from the Filipino Securities and Exchange Commission which lists the owners of the foreign entity; and stock ledger dated indicating that 1,000 shares of capital stock were issued to [REDACTED] on March 30, 2009.

The General Information Sheet created by the Filipino Securities and Exchange Commission for the foreign entity states that 2,500 of the 10,000 authorized shares were issued at par value to five shareholders. The document lists the five shareholders as: [REDACTED]

[REDACTED] and [REDACTED]. The information sheet indicates that [REDACTED] holds 1,000 shares of the foreign entity and each of the remaining four shareholders hold 375 shares of the foreign entity.

The minutes from the April 9, 2009 meeting authorized the issuance and sale of 1,000 shares of the petitioner's stock to the foreign entity for the total amount of \$5,000 stating that "the aggregate amount of consideration received by the Corporation for the stock, as a contribution to capital, and as paid-in surplus, shall be money or other property (other than stock or other securities) and shall not exceed \$5,000. The consideration for the shares to be issued pursuant to these resolutions shall be paid in full before the issuance and delivery of the shares or certificates representing the shares."

The director denied the petition finding that the petitioner failed to establish a qualifying relationship between the petitioner and the foreign entity. Specifically, the director noted that the 2010 U.S. corporate tax return claimed zero capital stock was issued, contradicting the Minutes of Meeting and the California Commissioner of Corporations Notice of Transaction. The director also noted that the petitioner failed to provide evidence that the foreign entity provided funding to the U.S. entity.

Counsel for the petitioner filed a motion to reopen and reconsider. Counsel explained that the petitioner did not provide evidence of the monies transferred from the foreign entity to the U.S. entity because the RFE "permitted Petitioner to submit any combination of evidence to so establish the qualifying relationship" and did not clearly request evidence of financial funding. In support of the motion, the petitioner provided a letter from the director of the foreign entity stating that the foreign entity gave the beneficiary \$1,750 in cash for the initial outlay of the U.S. company along with a statement from the petitioner's [REDACTED] account showing a cash deposit of \$1,750 on March 27, 2009. The petitioner also provided a letter dated February 16, 2012, from the branch manager of the [REDACTED] of the Philippines "to certify that [REDACTED] executed a wire transfer to [REDACTED] amounting to Four Thousand US Dollars (US \$4,000.00) under the account name [REDACTED] dated April 1, 2009" along with a statement from [REDACTED] petitioner's [REDACTED] account showing the petitioner received an incoming wire transfer from [REDACTED] in the amount of \$4,000 on April 2, 2009.

Counsel further explained that the inconsistencies between the petitioner's 2010 Form 1120 and the other evidence on record was the result of inadvertent accounting errors. The petitioner submitted an IRS Form 1120X, Amended U.S. Corporation Tax Return for the 2010 tax year. At Schedule K, line 5b of the amended tax return, the petitioner marked "Yes" in response to the question of whether it owns an interest of 50% or more in any foreign or domestic partnership. The petitioner indicated that it owns 100% of [REDACTED]

located in the Philippines. In addition, Schedule L, line 22 of the amended Form 1120 indicates that the petitioner's issued common stock had a value of \$5,750 at the end of the 2010 tax year. The amended tax return, at Schedule K, line 6, where the tax filer is asked to identify any foreign shareholder that owns directly or indirectly, at least 25% of the company's voting stock, was left blank.

The director granted the motion to reopen and reconsider, and affirmed the decision to deny the petition. The director acknowledged the newly submitted evidence, but found the evidence on record was insufficient to establish the petitioner's claimed qualifying relationship with the foreign entity. The director specifically noted that the petitioner did not establish a connection between the foreign entity and the named source of the \$4,000 wire transfer. The director further found that the evidence of a cash deposit to the petitioner's account and the letter from the foreign entity claiming that \$1,750 cash was disbursed to the beneficiary did not provide sufficient evidence to allow USCIS to trace the origins of the cash deposit to the foreign entity. Finally, the director stated that the amended tax return was prepared after the visa petition was denied and fails to establish the petitioner's eligibility at the time of filing.

On appeal, counsel asserts that the minutes of the board meeting, stock ledger, stock certificate, and Notice of Transaction filed with the State of California are sufficient to establish that the petitioner is a subsidiary of the foreign entity. Counsel also claims that bank statements and letters from the director of the foreign entity and manager of the Filipino bank submitted in support of the motion to reopen are sufficient to establish the foreign entity provided the funds for capitalization of the petitioner.

B. Analysis

Upon review, the AAO finds that the record fails to establish that the petitioner has a qualifying relationship with the foreign entity.

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 (Comm'r 1988); see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 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 factors 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.

The primary deficiencies cited by the director were: (1) the petitioner's failure to indicate its ownership by a foreign entity in its 2010 IRS Form 1120; and (2) the petitioner's failure to provide sufficient evidence that the foreign entity actually paid for its ownership of 1,000 share of the petitioner's stock.

On a combined motion to reopen and reconsider, the petitioner submitted an IRS Form 1120X, Amended U.S. Corporate Income Tax Return, for 2010. The AAO notes that an amended tax return purports to correct tax documents to reflect facts that were in existence at the time the petition was filed, therefore, an amended tax return will not be discounted solely because it post-dates the petition. Instead, when determining the weight to accord an amended tax return, the AAO looks to see whether there is other evidence on record to support the finding that there is a qualifying relationship, whether the amended documents are consistent with the other evidence on record, and whether the petitioner provided evidence that the amended tax return was actually filed with the IRS.

In the instant matter, the petitioner's Form 1120X indicates the amended tax return intends "to cor[r]ect the Schedule K, 5b showing the owner of the stock which is the [REDACTED] (Philippines) and also to correct the schedule L, 22 B, showing the sales of 1,000 shares for \$5,000 to [REDACTED] (Philippines) as capital and also the additional capital of \$750.00 which was inadvertently omitted." It is noted, however, that the information provided on the amended return is still inconsistent with the petitioner's claims. The tax return indicates at question 5b that the petitioner owns a 100% interest in the foreign entity. It also fails to list any direct or indirect foreign owner of at least 25% of the petitioner's stock shares. Therefore, the ownership information provided on the amended tax form does not support the petitioner's claim that the foreign entity owns 100% of the petitioner's stock. 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). Accordingly, the amended tax return, which was submitted without evidence of filing with the IRS, does not overcome the deficiencies of the original tax return. The petitioner has not submitted copies of its tax returns for any other tax year or other evidence that it has ever reported the foreign entity as its sole shareholder on a tax filing with the IRS.

With respect to the petitioner's claim that the foreign entity paid cash for its purchase of 5,000 shares of stock, the petitioner states that the foreign entity provided funding through two transactions, a cash deposit of \$1,750 and an incoming wire transfer of \$4,000. Although the petitioner submits bank statements from its [REDACTED] account showing a cash deposit made on March 27, 2009 and an incoming wire transfer on April 2, 2009, the petitioner failed to provide evidence to demonstrate that the cash deposit and the wire transfer originated with the foreign entity. The petitioner provides a letter from the director of the foreign entity claiming that the foreign entity made a cash distribution to the beneficiary and a bank statement indicating that a cash deposit of \$1,750 was made to the petitioner's account, but has not provided minutes from the board approving the transaction, evidence of a corresponding cash withdrawal from the foreign entity's account, evidence that the beneficiary was the source of the deposit in the U.S. account, or any other third party documents or evidence to allow USCIS to trace the source of funding to the foreign entity. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

Further, the record fails to establish the wire transfer originated with the foreign entity due to inconsistencies in evidence naming the funding source. A letter from the branch manager of the [REDACTED] in the Philippines certifies that on April 1, 2009, the foreign entity, [REDACTED] executed a wire transfer in the amount of \$4,000 to a [REDACTED] account owned by the petitioner. However, the petitioner's U.S. bank statement indicates the \$4,000 incoming wire transfer received April 2, 2009, was from [REDACTED]. The petitioner has not provided any evidence to demonstrate a connection between [REDACTED] and the foreign entity or provided any other evidence to reconcile the discrepancy in the named source of the wire transfer. As mentioned above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, the petitioner has failed to establish the wire transfer originated with the foreign entity.

The evidence is also inconsistent as to the details of the stock purchase. The petitioner submitted minutes from the first meeting of directors dated April 9, 2009, authorizing the company to issue 1,000 shares to the foreign entity for \$5,000. The minutes specifically state that "the consideration for the shares to be issued pursuant to these resolutions shall be paid in full before the issuance and delivery of the shares or certificates representing the shares." However, a notice of transaction from the California Commissioner of Corporations lists the company's date of first sale as March 16, 2009, and a stock certificate and corresponding stock ledger indicate that the foreign entity was issued 1,000 shares of the petitioner's stock on March 30, 2009. The petitioner states that the foreign entity paid for the stock through a cash distribution to the beneficiary and a wire transfer. The bank statements and letters submitted in support of the petitioner's claims indicate that the incoming wire transfer was completed April 2, 2009, and the cash deposit was received by the bank on March 27, 2009. The petitioner has failed to explain the conflicting dates of sale on the stock certificate, the bank statements, and the notice of transfer.

For the above reasons, the petitioner failed to establish that the petitioner and the foreign entity have a qualifying relationship. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record contains insufficient evidence that the foreign entity is doing business as a qualifying organization abroad as required under 8 C.F.R. § 214.2(l)(1)(ii)(G)(2).

The definition of a qualifying organization requires that the corporation "[i]s 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." 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). "Doing business" is defined at 8 C.F.R. § 214.2(l)(1)(ii)(H) as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad."

Although the petitioner stated that it was submitting supporting evidence included evidence of the foreign entity's ongoing business activities, the record does not establish that the foreign entity was doing business as required. The only evidence that shows the foreign entity engaged in business transactions consisted of two invoices dated August 4, 2010, thirteen months preceding the filing of the petition. Additionally, the business permit for the foreign entity included in the record expired on December 31, 2009. Based on the evidence submitted, the petitioner has not established that the foreign entity continues to do business as a qualifying organization abroad. For this additional reason, the petition cannot be approved.

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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

III. Conclusion

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. 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 the petitioner has not met that burden.

ORDER: The appeal is dismissed.