



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 98 254 52923

Office: California Service Center

Date:

AUG 21 2000

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:

Public Copy



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrence M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and the Associate Commissioner for Examinations dismissed the appeal. The matter will be reopened on the motion of the Associate Commissioner. The previous decision of the Associate Commissioner will be withdrawn and a new decision will be entered. The appeal will be dismissed.

The petitioner is a California corporation which claims to be engaged in the distribution of sporting goods and the sale of firearms and related accessories. It seeks to extend its authorization to employ the beneficiary temporarily in the United States as its chief executive officer. The director determined that the petitioner had not established that a qualifying relationship existed or that the petitioning enterprise and its parent were doing business in the United States and abroad in a regular, systematic, and continuous manner.

On appeal, counsel for the petitioner stated that the petitioner maintains a qualifying relationship with the overseas company, and that the petitioner's parent company is doing business abroad through its subsidiary companies. In addition, the petitioner claims that the sole reason for the denial is due to interference by the [REDACTED] for [REDACTED] which the petitioner claims has alleged criminal activity on the part of the beneficiary.

Regarding the nonimmigrant classification, section 101(a) (15) (L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a) (15) (L), defines a nonimmigrant intracompany transferee as follows:

an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge

8 C.F.R. 214.2(1)(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 (1)(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.

The first issue in this proceeding is whether a qualifying relationship exists between the United States company and the claimed parent company.

8 CFR 214.2(1)(1)(ii)(G) states:

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; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 CFR 214.2(1)(1)(ii)(I) states:

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

8 CFR 214.2(1)(1)(ii)(J) states:

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

8 CFR 214.2(1)(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 CFR 214.2(1)(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 nonimmigrant visa that the petitioner seeks is intended for multinational executives and managers. The language of the statute specifically limits this nonimmigrant visa classification to those executives and managers who have previously worked abroad for at least one year in the preceding three for the overseas entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. In order to qualify for this nonimmigrant visa classification, the petitioner must establish that there is a qualifying relationship between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the overseas company.

In the original petition, the petitioner asserted that it was the wholly-owned subsidiary of [REDACTED] a [REDACTED] corporation [REDACTED]. The petitioner further claimed that [REDACTED] was wholly owned by [REDACTED] of [REDACTED]. The petitioner was purportedly doing business overseas through the two claimed subsidiaries of [REDACTED] Corporation and [REDACTED].

Regarding the United States operations of the petitioning company, the petitioner claimed that it was engaged in the distribution of sporting goods and the sale of firearms through its subsidiary, [REDACTED] International Trading Corporation. The petitioner did not submit evidence to establish the claimed corporate relationships, other than a copy of a stock certificate, issued April 25, 1991, demonstrating that [REDACTED]

[REDACTED] owned 724,468 shares of [REDACTED]. The petitioner also submitted a copy of a "Plan and Agreement of [REDACTED] International Corporation and [REDACTED]" dated August 26, 1996, as well as a corporate resolution approving the merger.

In her decision, the director noted that the petitioner did not submit sufficient evidence to establish the relationship between [REDACTED] the alleged parent holding company, and the petitioner, its claimed subsidiary in California. After noting an apparent discrepancy between the number of shares issued by the petitioner and the number claimed to be owned by the parent company, the director concluded that the supporting documents were of limited evidentiary value. The director also determined that the petitioner did not submit evidence to establish the relationship between the claimed parent company and the

petitioner's overseas affiliates, [REDACTED] and [REDACTED]. The director referenced an earlier decision of the Administrative Appeals Office, in which the Associate Commissioner examined the relationship between these companies in a separate immigrant visa petition filed by the same petitioner for the same beneficiary.

On appeal, counsel asserts that the claimed holding company maintains ownership of the three foreign subsidiary companies, including the petitioner, through which the affiliates engage in international business. Counsel asserts that there was no discrepancy in the number of shares issued. In response to the director's finding, the petitioner submitted a copy of a letter from the petitioner's certified public accountant, explaining that the apparent incongruity in the number of shares issued was the result of the merger. The petitioner's accountant stated:

On August 26, 1996 [REDACTED] merged. The surviving corporation was [REDACTED]. The outstanding shares of [REDACTED] at the time of the merger were 617,283 shares. The outstanding shares of [REDACTED] at the time of the merger were 1,925,734. After the merger related party accounts between the two corporations were combined as required by tax law, and the stock outstanding was adjusted for these combined amounts resulting in a new ending capital stock balance in the amount of \$1,606,897 for the newly merged [REDACTED].

In reference to your letter of February 8, 2000, page 2, paragraphs 4,5,6,7, and 8, you appear to have confused the stock of the two companies.

There is no discrepancy between the total number of shares issued and outstanding as shown on the stock certificate No.2 and the merger agreement. The stock certificate No.2 was issued on 4-25-1991 [sic], five years before the merger, and had belonged to [REDACTED] California. [REDACTED] was merged into the already existing [REDACTED]. At the time of the merger, additional capitalization was made, resulting in a new capitalization of 1,925,734 shares, before combining the stock with [REDACTED]. [REDACTED] has ceased to function as a separate company. Certificate No.1 [sic] no longer applies.

In support of this assertion, the petitioner submitted a copy of stock certificate Number 3, dated September 16, 1996, which represents that [REDACTED] owns 1,606,897 shares of [REDACTED]. The petitioner did not submit evidence to establish the claimed number of shares outstanding at the time of the merger, nor did the petitioner

submit evidence to establish the claimed consolidation of "related party accounts" or the claimed "additional capitalization."

Counsel's assertions are not persuasive. 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 immigrant 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 of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). 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 of Scientology International at 595.

As general evidence in a nonimmigrant petition for a manager or executive, 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, the Service is unable to determine the elements of ownership and control.

The petitioner's arguments are not persuasive. In the initial petition, the petitioner claimed that it was a wholly-owned subsidiary of [REDACTED]. As evidence of this assertion, the petitioner submitted a copy of [REDACTED] stock certificate number two, which the petitioner's accountant has declared irrelevant on appeal. Although the petitioner had already merged with [REDACTED] at the time of filing, the petitioner maintained in an accompanying letter that the qualifying relationship persisted through the ownership of [REDACTED]. It is also noted that the petitioner failed to submit copies of the newly-issued stock certificates that would have established the post-merger ownership interests. Based on the evidence initially submitted, it was entirely appropriate for the director to note a discrepancy in the number of shares issued and declare the stock certificate of limited evidentiary value.

The petitioner has not submitted sufficient evidence to establish that a qualifying relationship persists between the claimed parent company and the [REDACTED]. On appeal, the petitioner submitted a copy of stock certificate number three, issued by [REDACTED] after the merger. This one stock certificate, by itself, does not establish the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. The petitioner did not submit copies of the corporate stock certificate ledger, stock certificate registry, corporate bylaws, or the minutes of relevant annual shareholder meetings. As the petitioner did not submit evidence of the claimed additional capitalization, the Service may not establish whether the claimed parent company contributed the new capital, or whether the funds were derived from a different source. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, the petitioner has submitted evidence which causes the Service to question whether the petitioner has fully disclosed the ownership structure of the petitioning enterprise. First, the petitioner's federal income tax returns report Penita-Hong Kong as a 23-percent indirect foreign shareholder. See Petitioner's IRS Form 5472, Part II, Line 3a, accompanying the 1995 Form 1120, U.S. Corporation Income Tax Return. All United States corporations must disclose whether they have any direct or ultimate indirect foreign shareholder that maintains a 25 percent ownership interest in the entity. Internal Revenue Code §§ 6038A, 6038C, 26 U.S.C. §§ 6038A, 6038C (2000). An indirect foreign shareholder is one which owns a percentage of the reporting corporation through an intervening entity. See Rev. Proc. 91-55, 1991-2 CB 784. The fact that Penita-Hong Kong has been reported as an indirect foreign shareholder indicates that there is an intervening entity that owns stock in Motrend International, through which [REDACTED] is ultimately an indirect owner. The petitioner did not disclose the identity of this intervening ownership interest.

Second, the petitioner's accountant asserts on appeal that the "related party accounts between [REDACTED] and the petitioner] were combined as required by tax law, and the stock outstanding was adjusted for these combined amounts resulting in a new ending capital stock balance in the amount of \$1,606,897 for the newly merged [REDACTED]". The petitioner initially claimed that [REDACTED] owned 100-percent of [REDACTED] and [REDACTED] in turn, owned 100-percent of the petitioner, [REDACTED]. The petitioner has not explained how only a portion of the shares were considered to be owned through related party accounts, when the two merged companies were claimed to be 100-percent, wholly-owned subsidiaries. If only a portion of the

shares were held through common accounts, it would suggest that the merged companies were not held fully and solely by the claimed owners. Again, the assertions made on appeal suggest that the petitioner has not fully disclosed the actual ownership structure of the petitioning company.

Finally, it is noted that the director observed that [REDACTED] was owned in the majority by [REDACTED] and that shares listed in her name were the result of a fraudulent stock transaction that resulted in a private lawsuit. The petitioner did not address this issue on appeal. Accordingly, the petitioner has not submitted sufficient evidence to establish the actual ownership structure of the petitioning company or its pre-merger parent.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). Where a petitioner seeks an immigration benefit based on a business transaction, the petitioner has the burden of establishing the essential elements of that transaction in their entirety. The Service cannot piece together transactions or adjudicate visa petitions based on assumptions.

As the petitioner did not submit sufficient evidence to establish the claimed relationship between the United States employer and the overseas company, and due to the contradictory evidence in the record, the petitioner has not met the burden of establishing that a qualifying relationship exists.

The final issue in this proceeding is whether the petitioner has been doing business in the United States and in at least one other country, through the regular, systematic, and continuous provision of goods or services.

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

Doing business means 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.

In her decision, the director stated that the claimed overseas parent company no longer existed and that the petitioner did not appear to be doing business in the United States. Based on the previous decision of the Associate Commissioner as well as an investigative report, the director found that neither the petitioner nor the overseas company were doing business in a regular, systematic, and continuous manner.

On appeal, counsel asserts that the petitioner is conducting international business through its affiliates in Taiwan and Malaysia. According to counsel, [REDACTED] is registered in Hong Kong as a multinational corporation which operates as a holding company. Counsel states:

[REDACTED] by virtue of it being a holding company, never directly conducted manufacturing, trading, investment or banking business. Rather, [REDACTED] (Hong Kong) conducted and continues to conduct, business through [REDACTED] its holding in Malaysia; [REDACTED] its holding in Taiwan; and through the petitioner herein [REDACTED] its holding in the United States.

It must be noted that the business activities of the claimed parent company and affiliates may not be attributed to the petitioner, as the petitioner has not established that a qualifying relationship exists, as previously discussed. However, for purposes of this decision, the petitioner's claims will be reviewed further.

In support of the claimed relationship, the petitioner has submitted copies of balance sheets, tax returns, and other business documents for the parent company and the three claimed affiliates. Upon review, the petitioner has submitted documents which reflect the existence of an agent or representative office in Hong Kong, and the past business activities of the companies which may or may not remain affiliated entities.

Regarding [REDACTED] the claimed parent holding company, the petitioner has submitted a copy of a letter from [REDACTED] of Hong Kong, which states that [REDACTED] acts as the company secretary for [REDACTED]. In this capacity, [REDACTED] is responsible for filing corporate annual returns, corresponding with the Hong Kong Companies Registry, as well as keeping the minutes book and other secretarial records. According to the letter, [REDACTED] has acted in this capacity only since July 16, 1999. The petitioner also included an annual return which was submitted to the Hong Kong Companies Registry in 1999. The petitioner did not submit any evidence which would establish that [REDACTED] maintains office facilities, has a staff to perform the day-to-day operations, or otherwise conducts business in a regular, systematic, and continuous manner. As conceded by counsel for the petitioner, [REDACTED] "never directly conducted manufacturing, trading, investment or banking business." As stated in the definition of "doing business," the "mere presence of an agent or office" will not suffice to establish that an enterprise is doing business in a regular, systematic, and continuous manner.

Counsel for the petitioner asserts that the parent company is doing business through the two claimed subsidiaries of [REDACTED]. Upon review, the petitioner has not established that a qualifying relationship exists between the claimed parent company, [REDACTED] Kong, and the claimed subsidiary, [REDACTED] in Taiwan. The petitioner did submit copies of [REDACTED] recent financial statements, as well as evidence that the company had prior transactions with the petitioner in 1991 and 1992. However, the record does not contain any evidence to establish that [REDACTED] maintains an ownership interest in [REDACTED]. Instead, the petitioner submitted a copy of the minutes of a 1991 meeting of the board of directors, which states that the board authorized the transfer of funds to a separate company, [REDACTED] so that it could purchase an 86.6-percent interest in [REDACTED]. Although the minutes state that [REDACTED] is a "100% subsidiary" of [REDACTED], no evidence was submitted to establish this claim, nor was any evidence submitted to establish the actual existence of this entity. Furthermore, no evidence was submitted to establish that the resolution of the board was actually executed and accomplished. Again, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, supra.

With regard to the second claimed affiliate, the petitioner submitted evidence of [REDACTED] ownership interest in [REDACTED] of Malaysia, as of 1990. As evidence of the claimed relationship, the petitioner submitted a copy of an agreement between [REDACTED] and [REDACTED] dated March 12, 1990, which states that [REDACTED] maintained a seventy-percent ownership interest in the company. However, the petitioner also submitted evidence that [REDACTED] had the option to reacquire twenty-one-percent of the equity from [REDACTED] once certain conditions were met, thereby restoring majority ownership to the [REDACTED]. No evidence was submitted to indicate whether this option was exercised. Furthermore, the petitioner did not submit evidence that would establish [REDACTED] current business activities. Instead, the petitioner submitted evidence of business activities from 1990 and 1991. This evidence included copies of documents regarding the start-up expenses of [REDACTED] and the negotiations regarding the transfer of factory equipment from Taiwan. This evidence does not establish that the company is currently engaged in the regular, systematic, and continuous provision of goods or services.

Finally, the petitioner submitted additional evidence regarding the claimed business activities of the petitioner, [REDACTED] the role of [REDACTED]. Although the petitioner never clarified the [REDACTED] the [REDACTED]

petitioner's claimed subsidiary, the petitioner has submitted sufficient evidence to establish that it is currently doing business in a regular, systematic, and continuous manner as a small firearms shop in [REDACTED] California. However, as the petitioner has failed to establish that a qualifying relationship exists with the claimed parent company and its alleged affiliates, the fact that the petitioner is actively doing business solely in the United States will not establish eligibility for the claimed immigration benefit. As noted previously, the petitioner must establish that it is doing business as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary. The petitioner has not satisfied this eligibility requirement.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary would be employed in a managerial or executive capacity as required at 8 C.F.R. 214.2(1)(3)(ii). The petition offers the following description of the beneficiary's proposed job duties:

[The beneficiary] will continue to have full responsibility at the executive level for the negotiation of all contracts and proposals in the marketplace with our vendors and suppliers. [The beneficiary] will continue to supervise the planning and directly monitor the operations and financial (profitability and cash flow) performance of our company. [The beneficiary] will continue to position our U.S. company logistically and financially for the necessary changes in the size of the operation and the range of products so marketed as our company continues to develop.

In describing the duties of the beneficiary, the petitioner has provided a vague and indefinite description of the beneficiary's proposed job duties. The petitioner's description does not disclose the beneficiary's day-to-day activities. Based on the petitioner's description of these job duties, the Service is unable to determine whether the beneficiary is functioning in a primarily managerial or executive capacity, or whether the beneficiary is primarily performing non-managerial, non-executive duties. As 8 CFR 214.2(1)(3)(ii) specifically requires a detailed description of the services to be provided, this evidence is not sufficient to establish that the beneficiary will be employed primarily in a managerial or executive capacity. Furthermore, it is noted that the beneficiary is one of two employees, as established by the payroll tax records. It is also noted that many invoices contained in the record indicate that the beneficiary has conducted clerical duties, such as placing and receiving orders for firearms and accessories from the company's suppliers. The record does not establish that the beneficiary has been and will continue to

primarily function in a managerial or executive capacity. As the appeal will be dismissed, this issue need not be examined further.

Finally, it must be noted that the petitioner's claims of interference by the [REDACTED] for [REDACTED] [REDACTED] are not relevant to this proceeding.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.