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

[redacted]

JAN 11 2002

File: LIN 99 218 50082 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

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

Robert P. Weimann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner engages in developing real estate. It seeks authorization to employ the beneficiary temporarily in the United States as its president and chief executive officer. The director determined that the petitioner had not established that a qualifying relationship had been established between the petitioner and the foreign entity. In addition, the director determined that the petitioner had not provided evidence that the beneficiary would be employed in a primarily managerial or executive capacity.

On appeal, counsel provides a new translation of a portion of the foreign entity's Articles of Incorporation and By-laws. Counsel asserts that the submission of new evidence establishes a qualifying relationship between the petitioner and the foreign entity. Counsel also states that the beneficiary qualifies for L-1 classification as a manager and an executive.

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.

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.

The United States petitioner was incorporated in 1991 and is wholly owned by the beneficiary. The petitioner is primarily engaged in the development of ski resort property in the United States. The beneficiary is the sole employee of the company. The petitioner seeks to continue the employment of the beneficiary as

its president and chief executive officer. The petitioner claims it is affiliated with BC Agromex GmbH. BC Agromex GmbH was incorporated in Germany in 1981.

The first issue in this proceeding is whether a qualifying relationship exists between the petitioning corporation and the foreign entity.

8 C.F.R. 214.2(l)(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 (l)(1)(ii) of this section;
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> (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 operation 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 in this case initially did not submit documentary evidence of the qualifying relationship between the United States entity and the foreign entity with its request to continue the employment of the beneficiary. On October 27, 1999, the director requested evidence that the petitioning entity had maintained a relationship with a qualifying organization in another country, directly or through a parent, branch, affiliate, or subsidiary. In addition, the director requested evidence that the foreign entity was doing business as an employer during the beneficiary's stay in the United States.

The director also requested documentary evidence that established the qualifying relationship between the foreign entity and the United States entity. The director indicated that evidence of a qualifying relationship could include annual reports, statements from the organization's president or corporate secretary, articles of incorporation, financial statements, or evidence of ownership of all outstanding stock for both entities.

In response, the petitioner submitted a copy of a Notice Document filed with the German District Court setting out the individuals who were authorized to act for BC Agromex GmbH. Counsel provided a certified translation of the document. In addition, the petitioner submitted a copy of the Articles of Incorporation and By-laws of BCA Construction Corporation. The petitioner also submitted a BCA Construction Corporation stock certificate for one thousand shares identifying the beneficiary as the owner of those shares.

The director denied the petition. The director noted that the stock certificate provided by the petitioner did indicate that the beneficiary owned 100% of the petitioner, BCA Construction Corporation. However, the director determined that the German District Court record did not indicate the ownership of BC Agromex, GmbH, the foreign entity. The director concluded that no qualifying relationship had been established.

On appeal, counsel submitted the Articles of Incorporation and By-laws of BC Agromex, GmbH with a partial translation as follows:

> (i) The Corporation may have one or more Managers.
>
> (ii) When only one Manager is seated, then he alone could represent the Corporation.

> (iii) If more Corporate Managers are voted in or appointed, then at that time only two of them together, or one of them together with the Procuristen, the treasurer or financial manager, is authorized to represent the Corporation; . . .

Counsel also provided a partial translation of an additional paragraph from the Articles of Incorporation as follows:

> (i) Corporate decisions must obtain a simple majority from all of the present votes, as long as neither these Articles and By-laws, nor the laws are violated by the majority vote.

Counsel for the petitioner re-submitted the Notice Document filed with the German District Court for BC Agromex, GmbH with a corrected certified English translation. The corrected translation of the Notice Document, including counsel's parenthetical comments, is as follows:

> A corporation with limited liability. The company Articles of Corporation and By-laws were agreed upon June 11, 1981. (Note: These are the controlling documents regarding entering into a GmbH pursuant to German law, and comparatively equivalent to a "c" corporation in the United States, but pursuant to the Articles of Corporation and the By-laws, this corporation does not have a board of directors.)
>
> When only one manager (executive officer) is seated, then he alone represents the corporation. If several corporate managers are seated, then at that time only two of them acting together, or one of them together with the Procuristen, the finance manager or treasurer, is authorized to represent the corporation. **The corporate assembly of the owners can override the individual rights of a manager to act alone and represent the corporation, even if several managers are seated** (emphasis added).
>
> <u>The manager [redacted] is authorized to represent the corporation alone. He is authorized through his position under the business laws either by himself or as a representative of a third unlimited representative to represent the corporation.</u>

(Emphasis in original.)

Counsel also submitted a certified English translation of a Contract of Purchase and Assignment, for BC Agromex, GmbH dated

June 8, 1982. According to the translation the beneficiary purchased two shares of BC Agromex, GmbH valued at 30,000 Deutsh Marks when the stated capital of the company was 60,000 Deutsh Marks. Counsel states that as a result of this transaction the beneficiary holds 50% of the outstanding shares of BC Agromex, GmbH.

According to a June 26, 1986 notice filed with the German District Court, translated by counsel, the beneficiary was appointed as executive manager and was capable of binding and representing the company. On June 19, 1989, a notice filed with the German District Court, translated by counsel, indicated that Rene Pfeiff, salesman, could sell and bind the company. It is unclear from the translation whether Mr. [redacted] job title is salesman or whether salesman refers to Mr. [redacted] as a seller of the company. Counsel asserts that since the beneficiary's purchase of 50% of BC Agromex, GmbH, in June of 1982, he has always been the manager or Procuristen of the company and has always had 50% ownership and veto power over all decisions. Counsel concludes that the petitioner and BC Agromex, GmbH are both owned and controlled by the beneficiary and that an affiliate relationship has been established between the two companies.

Counsel's conclusion is 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 the United States and a foreign entity for purposes of this nonimmigrant visa classification. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); see also Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant 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, 19 I&N Dec. 595 (BIA 1988).

In this case, the petitioner has submitted partially translated Articles of Incorporation and By-laws of the foreign entity, the claimed affiliate. These partially translated documents are insufficient to demonstrate who controls BC Agromex, GmbH.

8 C.F.R. 103.2(b)(3) states:

> Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Without the complete translation of the Articles of Incorporation and By-laws of BC Agromex, GmbH, the Service is unable to determine the actual control of BC Agromex, GmbH. Counsel's conclusion that control of BC Agromex, GmbH has been established is insufficient. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980.

Further, counsel's observation that the beneficiary's 50% ownership of BC Agromex, GmbH, and his role as its manager, created negative control of the claimed affiliate is not pertinent to the issue at hand. The concept of negative control is used in the context of ownership of a subsidiary that constitutes a joint venture. See 8 C.F.R. 214.2(l)(1)(ii)(K). There are no provisions in statute, regulation, or case law that allow for the recognition of veto power or negative control in other than a 50-50 joint venture. No evidence has been submitted that identifies BC Agromex, GmbH as a joint venture.

The petitioner has failed to demonstrate a qualifying relationship with a foreign entity as defined by 8 C.F.R. 214.2(l)(1)(ii)(G).

The second issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
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> (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), provides:

> The term "executive capacity" means 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 indicates the beneficiary's job duties are supervising on the construction site, doing paperwork involving bill control and marketing as well as planning and meeting with the real estate agency and architects.

On appeal, counsel claims that the beneficiary is employed in a managerial capacity. However, the record contains only a vague and general outline of the beneficiary's daily activity. In addition to the vague and general description of the beneficiary's job duties, counsel paraphrases the elements of the regulatory definition of managerial capacity in order to demonstrate the managerial capacity of the beneficiary. Counsel also asserts that a manager is not required to supervise a subordinate staff. Counsel supports this assertion with the statement that the petitioner contracts out all non-qualifying tasks to contractors. However, no evidence of the employment of contractors by the petitioner has been submitted.

The record, including counsel's comments, does not provide a comprehensive description of the beneficiary's duties. Paraphrasing the regulation as a substitute for a day-to-day description of the beneficiary's job duties is insufficient to demonstrate the beneficiary is acting in a managerial capacity. The record does not contain any evidence of a subordinate staff that would relieve the beneficiary from performing the day-to-day non-executive duties of the business.

Counsel also claims that the beneficiary is acting in an executive capacity for the petitioner. Counsel paraphrases the duties of the president of the company as outlined in the petitioner's By-laws to demonstrate the executive nature of the beneficiary's duties for the company. Counsel also paraphrases the elements of

the statutory definition for executive capacity and concludes the beneficiary is acting in an executive capacity. No concrete description is provided to explain what the beneficiary will do in the day-to-day execution of his position. The Service is not compelled to deem the beneficiary to be an executive simply because the beneficiary possesses an executive title. The petitioner has not established that the beneficiary will be employed in a primarily executive capacity.

Beyond the decision of the director, the petitioner has not provided evidence that the foreign entity continues to do business as an employer in a foreign country.

8 C.F.R. 214.2(l)(1)(ii)(H) states:

> *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.

There are two references in the record that imply the foreign entity will conduct business in Germany when the beneficiary returns. One letter signed on behalf of the foreign entity simply anticipates the return of the beneficiary in 2002. The second letter signed by the beneficiary on behalf of the petitioner indicates that the beneficiary will return to his position as 50% shareholder of the foreign entity and continue to purchase and renovate suitable properties in Germany.

There is no evidence that speaks to the current business activity of the foreign entity. The petitioner has not established that the foreign entity is currently doing business.

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.