D7

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: WAC 01 084 54112 Officee: CALIFORNIA SERVICE CENTER Date: FEB 27 2003

IN RE: Petitioner
Beneficiary: [redacted]

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 that 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner, a corporation specializing in the exportation of raw materials, seeks to continue to employ the beneficiary in the United States as its chief financial officer. The director determined that the petitioner had not established that a qualifying relationship exists between the United States corporation and a qualifying foreign entity. The director also determined that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel argues that the director's decision is contrary to applicable law. Additional information has been provided on appeal.

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 first issue to be addressed in this proceeding is whether the petitioner and the foreign entity are qualifying organizations.

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;

(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)(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.

In this case, the shares of the petitioning firm are held by three individuals as follows:

Yoshiaki Goto	2,000 (50%)
Mieko Yoshida	1,000 (25%)
Shihomi O'Connor	1,000 (25%)

The shares of the petitioner's claimed affiliate abroad, Nissin Chemical Industries Co., Ltd., are held by eight individuals as follows:

Yoshiaki Goto	17,800 (59.3%)
Toyoko Goto	4,200 (14%)
Ryukichi Arata	1,700 (5.7%)
Kazuko Arata	1,600 (5.3%)

[redacted]

Counsel states that the director misidentified Tomobumi Nakatsu as a shareholder of Nissin Chemical Industries Co. Ltd. (the entity abroad). Counsel indicates that although a stock certificate was issued by the petitioner [redacted] the share certificate was never signed by a corporate official and was never delivered to or paid for [redacted] Counsel submits a stock certificate number two on appeal which shows it was stamped "VOID."

The new copy of stock certificate number 2 forwarded for the record substantiates the explanation provided by counsel.

Counsel's argument that 59.3 percent ownership by Mr. Yashiaki Goto of Nissin Chemical Industries Co. Ltd. (the entity abroad) and 50 percent ownership of the petitioning corporation is sufficient to establish a parent-subsidiary relationship is not persuasive. Evidence of common ownership and control of each entity is required. Control may be *de jure* by reason of ownership of 51 per cent of outstanding stocks of the other entity or it may be *de facto* by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this case, the record demonstrates that the foreign entity is majority owned by the beneficiary and that the U.S. entity is owned 50 percent by the beneficiary, 25 percent by Mieko Yoshida and 25 percent by Shihomi O'Connor. Despite counsel's argument, the record does not demonstrate that the U.S. and foreign entities are owned and controlled by the same parent or individual, or that the two companies are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity. The record does not demonstrate that Mr. Yashiaki Goto exercises *de facto* control over International Exchange Services, Inc. through proxy votes or other means. Thus, a qualifying subsidiary or affiliate relationship cannot be shown to exist between the U.S. and foreign entities. For this reason, the petition may not be approved.

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

The beneficiary entered the United States in May of 2000 in L-1A nonimmigrant status based upon a petition that was approved through January 17, 2001. The petitioner was incorporated on January 7, 1999, in the State of California. The petitioner now

seeks to extend the petition's validity and the beneficiary's stay for an additional three years.

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

> The term "managerial capacity" means 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), 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
>
> iii. receives only general supervision or direction from higher level executives, the board

of directors, or stockholders of the organization.

The petitioner's Corporate Secretary, in a letter dated May 24, 2001, describes the beneficiary's present and proposed job duties in the United States as follows:

> She manages the financial operations of the company including exercising control over the budget, expenditures, banking and accounting practices of the company. She functions at a senior level within the company hierarchy and, as explained in the original supporting letter submitted with the petition herein, is the:
>
> > . . .highest ranking financial officer of the company and her duties encompass developing regular reports regarding sales, budget expenditures and operating costs to the parent corporation in Japan.

The petitioner explains that the beneficiary reports directly to the president of the Japanese company, Nissin Chemicals Industries Co., Ltd. The petitioner states that the beneficiary exercises discretion over the day-to-day financial operations of the company including making all final budget and economic decisions based on financial projections and models submitted to the board of directors. The petitioner further indicates that the beneficiary's duties include developing cash flow projections, short and long term budgets and exercising authority over all financial and accounting aspects of the company's U.S. operations.

The organizational chart provided for the record shows that the president of the petitioning firm is a resident of Japan. The United States corporation employs four persons including the beneficiary who is under the direct supervision of the general manager. The other two employees, a secretary and a staff person, are also under the supervision of the general manager.

The descriptions of the beneficiary's job duties are insufficient to warrant a finding that the beneficiary will be employed in a managerial or executive capacity. It appears, at most, the beneficiary will be performing operational rather than managerial duties. The petitioner has provided insufficient evidence to establish that the beneficiary has been or will be managing or directing the management of a function, department, subdivision or component of the U.S. company.

Based upon the record, the petitioner has not provided evidence that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve her from performing non-qualifying duties. It appears that the beneficiary is the individual performing the necessary tasks for

the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.