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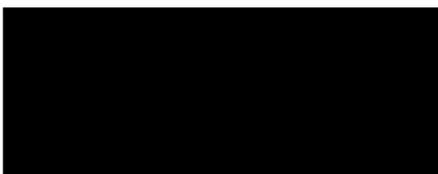
U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. 3000
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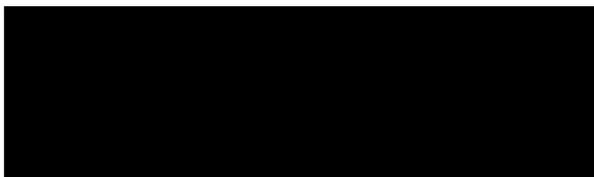


FILE: EAC 04 095 51924 Office: VERMONT SERVICE CENTER Date: APR 05 2007

IN RE: Petitioner: [Redacted]
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)

ON BEHALF OF PETITIONER:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal based on counsel's failure to submit a brief or evidence in support of the appeal. The matter is now before the AAO on a motion to reopen, with evidence that counsel timely submitted a brief in support of the appeal. The AAO will grant the petitioner's motion and affirm its previous decision.

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 is a New York corporation engaged in buying and exporting department store merchandise. It claims to be an affiliate of the "Rustan Group of Companies," located in Mandaluyong, Philippines. The petitioner seeks to employ the beneficiary as its general manager for a three-year period.

The director denied the petition on June 3, 2004 concluding that the petitioner had not established that: (1) the beneficiary would be employed in a managerial or executive capacity; or that (2) the petitioner has a qualifying relationship with the foreign entity.

The petitioner subsequently filed an appeal on June 28, 2004 and indicated on the Form I-290B, Notice of Appeal, that a brief and/or evidence were being submitted in support of the appeal. As no brief or evidence was attached to the appeal, and there was no indication that counsel submitted or intended to submit additional evidence at a later date, the AAO considered the record complete and summarily dismissed the appeal in a decision dated February 1, 2006. Upon review of the record, the AAO withdrew the director's determination that the beneficiary would not be employed in the United States in a primarily managerial or executive capacity. However, the AAO found insufficient evidence to establish that the petitioner and the beneficiary's current foreign employer have a qualifying relationship.

The petitioner timely filed the instant motion to reopen on February 17, 2006, with evidence that counsel did submit a brief and evidence to the Vermont Service Center on July 6, 2004. In a brief dated July 1, 2004, counsel for the petitioner states: "We feel that the material initially submitted, and that which was subsequently supplied to the [director], and the material and statement submitted herewith established the qualifying relation between the petitioner and the overseas company." The only supporting evidence submitted is a copy of the U.S. company's stock certificate number seven, issued to "Rustan Commercial Corporation," for ten shares of the petitioner's stock. The AAO will reopen the matter in order to consider this new evidence.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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 sole issue to be discussed in the present matter is whether the petitioner has established that a qualifying relationship exists between the U.S. company and the beneficiary's overseas 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).

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 nonimmigrant petition was filed on February 17, 2004. The petitioner stated on Form I-129 that the U.S. company is an affiliate of the "Rustan Group of Companies," located in the Philippines. Where asked to describe the stock ownership and managerial control of each company, the petitioner indicated "100%" but did not provide an explanation. In a letter dated January 22, 2004, the petitioner stated that the petitioner is a wholly owned subsidiary of the Rustan Group of Companies, described as a group of "eight independently created and autonomous corporate organizations."

In support of the petition, the petitioner submitted the petitioner's stock certificate number one issuing ten shares of stock to [REDACTED] in an accompanying cover letter dated February 12, 2004, counsel for the petitioner indicated that [REDACTED] is now [REDACTED] a and is "one of the owners of Rustan." The petitioner also submitted the U.S. company's IRS Form 1120, U.S. Corporation Income Tax Return, for the 2002 tax year, which indicates at Schedule K that the company has one shareholder. The petitioner indicated that no foreign person or company owns directly or indirectly at least 25% of the company's stock.

With respect to the foreign entity, the petitioner submitted: (1) a certificate of filing of amended by-laws by "Rustan Commercial Corporation" dated October 4, 1979; (2) a certificate of filing of amended articles of incorporation with the Philippines Securities and Exchange Commission, dated April 29, 1986, which indicates that Rustan Commercial Corporation had issued 2,000 out of 3,000,000 authorized shares as follows: [REDACTED] (992 shares), [REDACTED] (992 shares), [REDACTED] (8 shares), [REDACTED] (4 shares) and [REDACTED] (4 shares); and (3) a balance sheet for Rustan Commercial Corporation for the fiscal year ended on December 31, 2002, which indicates that the company

has issued 8,530,256 out of 10,000,000 authorized shares of stock. The petitioner submitted evidence that the beneficiary is on the payroll of "Rustan Investment & Management Corporation," but did not provide evidence of the ownership of that company.

On February 27, 2004, the director issued a request for additional evidence, in part, instructing the petitioner to submit a copy of the stock ledger for the U.S. company showing all transactions since the incorporation of the company in 1990, along with copies of all stock certificates that have been issued by the U.S. company.

In a response dated May 20, 2004, the petitioner submitted a copy of its stock certificate number one issuing ten shares of stock to [REDACTED] and its stock certificate number two issuing ten shares of stock to [REDACTED]. Neither stock certificate is dated. The petitioner also submitted its stock transfer ledger which indicates that stock certificate number one was issued in 1990 and stock certificate number two was issued in 2003. The stock transfer ledger also indicates that [REDACTED] changed her name to [REDACTED]. It is not clear if an additional 10 shares were issued, or if the initial ten shares were re-issued in the shareholder's new name. No other stock transactions appear on the stock transfer ledger.

The petitioner also submitted a "General Information Sheet for Stock Corporation" for Rustan Commercial Corporation, filed in the Philippines in October 2003, which identifies the ownership of the company as follows:

[REDACTED]	1,421,683 shares
[REDACTED]	1,421,682 shares
[REDACTED]	10 shares
[REDACTED]	1,421,683 shares
[REDACTED]	1,421,683 shares
[REDACTED]	1,421,682 shares
[REDACTED]	1 share
[REDACTED]	1,421,672 shares

The director denied the petition on June 3, 2004, concluding that the petitioner had not established that the U.S. company has a qualifying relationship with the beneficiary's foreign employer. The director noted that the evidence submitted shows that [REDACTED] owns the U.S. company, but owns only a portion of the foreign entity, along with six other individuals and one company. The director concluded that the evidence does not establish that the U.S. company and the foreign company are owned and controlled by the same individual or group of individuals, with each individual owning and controlling approximately the same share or proportion of each entity.

The AAO affirmed the director's decision on appeal in its decision dated February 1, 2006, noting several additional deficiencies with respect to the evidence the petitioner submitted to demonstrate its claimed affiliate relationship with the foreign entity. Specifically, the AAO noted that the petitioner submitted evidence to demonstrate that "Rustan Investment & Management Corp." currently employs the beneficiary, but provided no evidence of ownership for this company. Instead, the petitioner submitted evidence of ownership for a different foreign company, "Rustan Commercial Corp.," yet failed to explain how this

company is related to the beneficiary's foreign employer. For this reason alone, the AAO determined that the petitioner had not established the claimed qualifying relationship between the petitioner and the beneficiary's foreign employer, as required by 8 C.F.R. § 214.2(l)(3)(i).

Furthermore, the AAO affirmed the director's determination that the petitioner had failed to demonstrate an affiliate relationship between the petitioner and Rustan Commercial Corp. As noted by the director, the evidence submitted suggested that [REDACTED] wholly owns the petitioning company, yet shows that the same individual owns only 16.67 percent of the issued stock of Rustan Commercial Corp.

In the appellate brief provided on motion, counsel for the petitioner simply asserts that the previously submitted evidence is sufficient to establish a qualifying relationship between the petitioner and the overseas company. In support of this assertion, the petitioner submits its stock certificate number seven issuing 10 shares of stock to Rustan Commercial Corporation. The stock certificate is not dated, nor is it accompanied by the petitioner's stock transfer ledger. Counsel does not address the specific deficiencies discussed in the AAO's decision.

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, CIS is unable to determine the elements of ownership and control.

Contrary to counsel's assertions, for the reasons discussed above, the evidence of record does not clearly establish the existence of a qualifying relationship between the petitioner and the foreign entity. Further, the new evidence introduced in this proceeding raises additional questions regarding the actual ownership of the United States entity. The petitioner was specifically requested to submit copies of all stock certificates issued by the U.S. company since 1990, and the evidence submitted in response to the director's request for evidence indicated that the petitioner was solely owned by Maria Elena Valbuena, a minority shareholder of Rustan Commercial Corporation. Now, on appeal, the petitioner submits evidence that the U.S. company has

apparently issued at least seven stock certificates, including stock certificate number seven for ten shares issued to Rustan Commercial Corporation. The petitioner has not provided the date of issuance for the newly submitted stock certificate, explained why this stock certificate was not provided in response to the director's request for evidence, nor provided evidence related to the issuance of stock certificates number three through number six. 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)). 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).

In the event that the stock certificate number seven was issued to Rustan Commercial Corp. subsequent to the filing of the instant petition, the AAO emphasizes that the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Furthermore, the petitioner does not explain how the issuance of ten shares of stock to Rustan Commercial Corporation would establish the claimed affiliate relationship between the petitioner and the beneficiary's foreign employer, which appears to be a company called Rustan Investment & Management Corp. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As noted above, the record contains no evidence of the ownership and control of Rustan Investment & Management Corp., nor any documentary evidence which would suggest that Rustan Commercial Corporation was in fact the beneficiary's foreign employer.

In sum, the record does not clearly identify the beneficiary's foreign employer, does not contain evidence of the ownership and control of the company which appears to be the beneficiary's employer, and does not contain persuasive documentary evidence of the ownership and control of the petitioning company. Given these deficiencies, the petitioner has not established that the petitioner enjoys a qualifying relationship with the beneficiary's foreign employer. Accordingly, the AAO properly dismissed the appeal.

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 this burden.

ORDER: The AAO's prior decision, dated February 1, 2006, is affirmed.