Republic of the Philippines
Department of Trade and Industry
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

08 December 2009

SEC-OGC Opinion No. 09-01-A
Citizenship Requirement to participate in Private Recruitment

DONATO ZARATE & RODRIGUEZ
7/F Electra House
115 Esteban Street
Legaspi Village, 1229 Makati City

Attention: Mr. Demosthenes B. Donato

Gentlemen:

This refers to your 20 January 2009 letter requesting, on behalf of your client Dohle Manning Agencies Ltd. ("DMAL"), a review and/or clarification on the SEC-OGC Opinion No. 09-01, series of 2009 ("Opinion," for brevity) issued by this Office.

In particular, you would like to be clarified on the qualification of a trustee of a retirement trust fund to acquire, own and, hold 75% of the voting capital stock of a recruitment agency.

To recapitulate, the following are the pertinent facts:

1. DMAL is a non-resident foreign corporation, organized and existing under the laws of the Isle of Man, a Crown Dependency under the responsibility and nationality of the United Kingdom. It is not engaged in any business in the Philippines.

2. DMAL is contemplating on investing in the 25% of the voting capital stock of a seaman manning agency, in joint venture with a Philippine trustee of funds for the retirement benefits of Filipino employees, where the trustee will hold 75% of the voting capital stock reserved for Filipino citizens. DMAL is also contemplating on investing in 100% of the preferred non-voting capital stock of the manning agency.

3. On 12 January 2009, this Office rendered an opinion stating that:

a. The propriety of the trustee investing the funds of the employee retirement fund in 75% of the voting capital stock of a manning or recruitment agency would depend on the provisions of the trust agreement entered into by the trustor, or the employer company, and the trustee.

b. The 75% nationality requirement for recruitment agencies applies only to the voting capital stock and therefore foreign nationals are qualified to own and hold one hundred percent (100%) of the preferred non-voting capital stock of recruitment agencies.

You would like now to be clarified on the first part of the opinion with regard to the qualification of a trustee of a retirement trust fund to acquire, own and hold 75% of the voting capital stock of a recruitment agency. In particular, you would like to seek confirmation that a retirement fund trustee, which is a Philippine national and at least 60% of the fund will accrue to the benefit of the Philippine nationals, meets the citizenship requirement under Article 27 of the Labor Code of the Philippines,[1] which reads as follows:

> "ART. 27. Citizenship Requirement. — **Only Filipino citizens or corporations, partnerships or entities** at least seventy-five percent (75%) of the authorized and voting capital stock of which is owned and controlled by Filipino citizens shall be permitted to participate in the recruitment and placement of workers, locally or overseas." (Emphasis supplied)

In the Omnibus Rules Implementing the Labor Code, it is stated that:

> "RULE V
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> Private Employment Agencies
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> SECTION 1. Qualifications of applicants. — All applicants for license to operate private employment agencies either for local or overseas recruitment and placement shall possess the following qualifications:
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> (a) Citizenship requirement as provided for in Rule IV of these Rules;xxx"

On the other hand, Rule IV provides:

> "RULE IV
>
> xxx
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> SECTION 2. Citizenship requirement. — Only Filipino citizens or corporations, partnerships or entities at least seventy-five percent (75%) of the authorized and voting capital stock of which is owned and controlled by

[1] Presidential Decree No. 442 (1974).

Filipino citizens shall be permitted to participate in the recruitment and placement of workers, locally or overseas." (Underscoring supplied)

It is likewise stated in the Seventh Foreign Negative List (FINL) that foreign equity in private recruitment, whether for local or overseas employment is limited only to twenty five percent (25%) of the voting stock of the agency.[2]

From the foregoing provisions of the applicable laws and rules, only Filipino citizens or corporations, partnerships or entities at least seventy-five percent (75%) of the authorized and voting capital stock of which is owned and controlled by Filipino citizens shall be permitted to participate in the recruitment and placement, whether for local or overseas employment.

To determine whether an entity is considered a "Philippine national" for purposes of making investments in the Philippines, Section 3 (a) of R.A. No. 7042, also known as the "Foreign Investments Act of 1991" shall govern, thus:

"Sec. 3. Definitions xxx

a) The term "Philippine national" shall mean a citizen of the Philippines or a domestic partnership or association wholly owned by citizens of the Philippines; or a corporation organized under the laws of the Philippines of which at least sixty percent (60%) of the capital stock outstanding and entitled to vote is owned and held by citizens of the Philippines; or a trustee of funds for pension or other employee retirement or separation benefits, where the trustee is a Philippine national and at least sixty percent (60%) of the fund will accrue to the benefit of the Philippine nationals: Provided, That where a corporation and its non-Filipino stockholders own stocks in a Securities and Exchange Commission (SEC) registered enterprise, at least sixty percent (60%) of the capital stocks outstanding and entitled to vote of both corporations must be owned and held by citizens of the Philippines and at least sixty percent (60%) of the members of the Board of Directors of both corporations must be citizens of the Philippines, in order that the corporations shall be considered a Philippine national;" (Underscoring supplied)

In order for a trustee of funds to be considered a Philippine national, two requirements must be satisfied, namely: (1) the trustee is a Philippine national and (2) at least sixty percent (60%) of the fund will accrue to the benefit of the Philippine nationals.

In the case of the proposed transaction to be entered into by the Philippine trustee of funds for the retirement benefits of Filipino employees, where the trustee will hold 75% of the voting capital stock reserved for Filipino citizens, this Office opines that the said trustee meets the citizenship requirement for it to participate in private recruitment. Stated otherwise, where a trustee is a Philippine national and at least seventy-five percent (75%) of the fund will accrue to Philippine nationals, the said trust fund may own voting shares in a private recruitment agency.

[2] Executive Order No. 584 (2006).

It shall be understood that the foregoing opinion is rendered based solely on the facts and circumstances disclosed and relevant solely to the particular issues raised therein and shall not be used in the nature of a standing rule binding upon the Commission in other cases whether of similar or dissimilar circumstances.[3] If, upon investigation, it will be disclosed that the facts relied upon are different, this opinion shall be rendered null and void.

Please be guided accordingly.

Very truly yours,

VERNETTE G. UMALI-PACO
General Counsel

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[3] S.E.C Memorandum Circular No. 15 dated 16 December 2003.